Supreme Court, U.S.
FILED

No. 05-___ 04-757 DEC 1 - 2004

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JEB BUSH,
Governor of the State of Florida.
Petitioner,

v.

MICHAEL SCHIAVO,
Guardian: Theresa Schiavo
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

---

PETITION FOR A WRIT OF CERTIORARI

KENNETH L. CONNOR
CAMILLE GODWIN
WILKES & MCHUGH, P.A.
One North Dale Mabry
Suite 800
Tampa, Florida 33609
(813) 873-0026

ROBERT A. DESTRO *
3600 John McCormack Rd., N.E.
Washington, D.C. 20064
(202) 319-5202

* Counsel of Record

Counsel for Petitioner
Jeb Bush, Governor of Florida

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Did the Florida Supreme Court's misapplication of the separation of powers principles enunciated in *Plaut v. Spendthrift Farm* violate the rights of the Governor and his incompetent ward under the Fourteenth Amendment to the Constitution of the United States?

2. Did the Florida Supreme Court violate the federal due process rights of the Governor and his incompetent ward when it gave preclusive effect to factual findings in a substituted judgment proceeding to which the Governor was not a party?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	4
ARGUMENT	9
I. The Florida Supreme Court's Misapplication of the Separation of Powers Principles Enunciated in *Plaut v. Spendthrift Farm* Denied the Governor His Federal Due Process Rights and Prevented the State of Florida from Protecting the Due Process And Equal Protection Rights of Incompetent Persons Whose Nutrition and Hydration have been Withdrawn by Court Order	9
A. The Florida Supreme Court Misapplied this Court's Ruling in *Plaut v. Spendthrift Farm*	9
1. Chapter 2003-418 Does Not Violate the Separation of Powers Doctrine	10
2. The Florida Supreme Court's Holding Limits the State's Ability to Comply with the Fourteenth Amendment	11
B. The Florida Supreme Court Ruling Violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment	14

TABLE OF CONTENTS—Continued

Page

C. This Court Should Grant the Writ and Affirm the Power of State Legislatures to Structure the Process in which Substituted Judgment Decisions are Made for Incompetent Wards 18

II. The Florida Supreme Court Violated the Federal Due Process Rights of the Governor and his Incompetent Ward When It Gave Preclusive Effect to Factual Findings in a Substituted Judgment Proceeding to which the Governor as not a Party 20

A. The Due Process Clause of the Fourteenth Amendment Forbids Granting Preclusive Effect to Disputed Facts Developed in a Proceeding to which the Petitioner was not a Party 21

B. The State of Florida is Authorized by the Fourteenth Amendment to Name the Governor Proxy for the Class of Vulnerable Individuals Described by Chapter 2003-418 22

CONCLUSION 26

TABLE OF AUTHORITIES

CASES	Page
Advocacy Center for Persons With Disabilities, Inc. v. Schiavo, 2003 WL 23305833, 17 Fla. L. Weekly Fed. D 291, (M.D. Fla., Oct 21, 2003)	6
Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986)	17
Barefoot v. Estelle, 463 U.S. 880 (1985)	25
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930)	22
Bush v. Schiavo, 2004 WL 2109983, 29 Fla. L. Weekly S515 (Fla. No. SC04-925, Sep 23, 2004)	*passim*
Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985)	13, 17
Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990)	*passim*
Gallagher v. Motors Ins. Co, 605 So.2d 62 (Fla. 1992)	21
Hansberry v. Lee, 311 U.S. 32 (1940)	21
In re Guardianship of Browning, 568 So. 2d 4 (Fla.1990)	12
In re Guardianship of Schiavo, 780 So. 2d 176 (Fla. 2d DCA 2001) ("*Schiavo I*")	5, 8, 15, 16, 17, 18
In re Guardianship of Schiavo, 789 So. 2d 348 (Fla. 2001) (Table)	15, 16
In re Guardianship of Schiavo, 792 So. 2d 551 (Fla. 2d DCA 2001) ("*Schiavo II*")	5
In re Guardianship of Schiavo, 800 So. 2d 640 (Fla. 2d DCA 2001) ("*Schiavo III*")	5
In re Guardianship of Schiavo, 851 So. 2d 182 (Fla. 2d DCA 2003) ("*Schiavo IV*")	5, 8
In re Guardianship of Schiavo, 855 So. 2d 621 (Fla. 2d DCA 2003)	5

TABLE OF AUTHORITIES—Continued

	Page
In re Jobes, 108 N.J. 394, 529 A.2d 434 (1987) ...	18
In re Murchison, 349 U.S. 133 (1955)	17
In re TW, 551 So. 2d 1186 (Fla. 1989).....	17
Jackson v. Indiana, 406 U.S. 715 (1972)	13, 17
John F. Kennedy Memorial Hosp., Inc. v. Bludworth, 452 So.2d 921 (Fla.1984).....	12
Landgraf v. USI Film Products, 511 U.S. 244 (1994).....9, 10, 11, 14	
Lockport v. Citizens for Community Action at Local Level, Inc., 430 U.S. 259 (1977).....	21
Lochnar v. Thomas, 517 U.S. 314 (1996)	25
Michael Schiavo v. Jeb Bush, Fla. Sixth Judicial Cir., No. 03-008212-CI-20, 2004 WL 980028 (Fla. Cir. Ct.).....	*passim*
Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).....8, 9, 10, 11	
Richards v. Jefferson County, Alabama, 517 U.S. 793 (1996).....	21
Tennessee v. Lane, 124 S.Ct. 1978 (2004)	17
Theresa Marie Schindler Schiavo, an Incompetent Ward, Incapacitated, by her Parents and Next Friends, Robert and Mary Schindler v. Michael Schiavo, Individually, and in his Capacity as Guardian of the Person of Theresa Marie Schindler Schiavo, Incapacitated, 2003 WL 22469905 (M.D. Fla., Sep 23, 2003).....	6
Ward v. Village of Monroeville, Ohio, 409 U.S. 57 (1972).....	17
Youngberg v. Romeo, 457 U.S. 307 (1982).....	13, 17

STATUTES

Fla. Stat. § 22.06.....	6
Fla. Stat. § 27.703.....	7

TABLE OF AUTHORITIES—Continued

	Page
FLA. STAT. § 44.309	13
FLA. STAT. § 86.071	7, 21
FLA. STAT. §§ 744.101 *et seq.*	13, 15
FLA. STAT. § 744.309(1)(b)	15
FLA. STAT. § 744.309(3)	16
FLA. STAT. § 765	13, 15
FLA. STAT. § 765.101	18
FLA. STAT. § 765.102(1)	18
FLA. STAT. § 765.401	13, 15, 18
FLA. STAT. § 765.404	13, 15
FLA. STAT. § 940.03	6, 7
Ch. 2003-418, Laws of Florida	*passim*
CONSTITUTIONAL PROVISIONS	
FLA. CONST., art. IV § 1	10, 14
FLA. CONST., art. I § 23	6
FLA. CONST., art. IV § 8	6
FLA. CONST., art. IV § 8(a)	7
U.S. CONST. art. VI	14
U.S. CONST., amend. XIV § 1	*passim*
RULES	
FLA. R. CRIM. P. 3.851(b)	7
OTHER AUTHORITIES	
Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1989-1990)	14
RESTATEMENT (2d) JUDGMENTS §42(1)	25
Executive Order No. 03-201	*passim*

IN THE

Supreme Court of the United States

No. 05-___

JEB BUSH,
Governor of the State of Florida.

Petitioner,

v.

MICHAEL SCHIAVO,
Guardian: Theresa Schiavo

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

Michael Schiavo v. Jeb Bush, Fla. Sixth Judicial Cir., No. 03-008212-CI-20, 2004 WL 980028 (May 5, 2004, Fla. Cir. Ct.) [App. 1].

Bush v. Schiavo, 2004 WL 2109983, 29 Fla. L. Weekly S515 (Fla. No. SC04-925, Sep 23, 2004) [App. 2].

JURISDICTIONAL STATEMENT

The Supreme Court of Florida entered judgment in this case on September 23, 2004 [App. 2] and denied the Governor's motion for rehearing on October 21, 2004. [App. 3]. The jurisdiction of this Court rests upon 28 U.S.C. § 1257(a). Petitioner seeks reversal of the Supreme Court of

Florida's decision, which, as explained below, violates the rights of the Governor and his ward under the Fourteenth Amendment to the Constitution. Petitioner raised the federal claims discussed in this Petition in the Circuit Court and in the Florida Supreme Court.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Chapter 2003-418, Laws of Florida:

Section 1. (1) The Governor shall have the authority to issue a one-time stay to prevent the withholding of nutrition and hydration from a patient if, as of October 15, 2003:

(a) That patient has no written advance directive;

(b) The court has found that patient to be in a persistent vegetative state;

(c) That patient has had nutrition and hydration withheld; and

(d) A member of that patient's family has challenged the withholding of nutrition and hydration.

(2) The Governor's authority to issue the stay expires 15 days after the effective date of this act, and the expiration of that authority does not impact the validity or the effect of any stay issued pursuant to this act. The Governor may lift the stay authorized under this act at

any time. A person may not be held civilly liable and is not subject to regulatory or disciplinary sanctions for taking any action to comply with a stay issued by the Governor pursuant to this act.

(3) Upon the issuance of a stay, the chief judge of the circuit court shall appoint a guardian ad litem for the patient to make recommendations to the Governor and the court.

Section 2. This act shall take effect upon becoming a law.

STATEMENT OF THE CASE

This case began as a declaratory judgment action challenging the facial and "as applied" constitutionality of Chapter 2003-418, Laws of Florida, adopted on October 21, 2003. [App. 4]. The Circuit Court for Pinellas County, Florida granted a summary final judgment of unconstitutionality on May 14, 2003. *Michael Schiavo v. Jeb Bush*, Fla. Sixth Judicial Cir., No. 03-008212-CI-20, 2004 WL 980028 (Fla. Cir. Ct.). [App. 1] The Governor appealed the summary final judgment on May 18, 2004 to the Second District Court of Appeal for the State of Florida. The Second District issued an order to show cause as to why the matter should not be immediately transferred to the Florida Supreme Court for resolution as an issue of great public importance. On June 16, 2004, the Florida Supreme Court accepted jurisdiction of the appeal. On September 23, 2004, the Florida Supreme Court affirmed the Circuit Court's ruling. *Bush v. Schiavo*, 2004 WL 2109983, 29 Fla. L. Weekly S515 (Fla. No. SC04-925, Sep 23, 2004). [App. 2]. The Court denied the Governor's motion for rehearing on October 21, 2004 [App. 3] and issued its mandate on October 22, 2004. The Governor filed a motion to recall the mandate of the Supreme Court on October 25, 2004, and the Court granted the motion on October 27, 2004. The mandate will re-issue on November 30, 2004 unless this Court grants a stay. Proceedings in the

guardianship have been stayed by the Probate Court until all appeals have been exhausted.

In addition to raising federal due process issues throughout the Circuit Court proceedings below, the Governor raised federal due process rights in the proceedings before the Florida Supreme Court as follows: *July 6, 2004* Initial Brief of Appellant Jeb Bush, Governor of the State of Florida [App. 6, pp. 9-20]; *August 5, 2004* Reply Brief of Appellant Jeb Bush, Governor of the State of Florida [App. 7 pp. 6-7].

STATEMENT OF FACTS

On September 17, 2003, the Probate Division of the Circuit Court of Pinellas County, Florida, entered an order authorizing the removal of the nutrition and hydration tube from Theresa Marie Schiavo. In relevant part, the Order provides:

> **ORDERED AND ADJUDGED** that the Guardian, Michael Schiavo, shall cause the removal of the nutrition and hydration tube from the Ward, Theresa Marie Schiavo, at 2:00 P.M. on the 15th day of October, 2003.
>
> **DONE AND ORDERED** in chambers at Clearwater, Pinellas County, Florida this 17th day of September at 3:30 o'clock, p.m. [App. 8].

The court's order was fully executed. The nutrition and hydration tube was withdrawn on October 15, 2003. The death watch over Terri Schiavo had begun.

Public reaction to the dramatic, and apparently final, chapter of this long, personal and public tragedy was intense. Though families are often divided over decisions to withdraw nutrition and hydration from a patient found to be in a persistent vegetative state (PVS), they are *not* usually divided—as the parties are here—over whether the person is actually *in* a PVS and whether the trial was tainted *ab initio* by a judicial conflict of interest.

Predictably, both the Governor and the Legislature received petitions for redress of these and related grievances, and it is undisputed that the petitions asked for executive and legislative redress of grievances arising from the actions *of the Florida courts themselves*. Among the claims raised were:

1. Terri Schiavo is not actually *in* a persistent vegetative state because she is able to interact with her visitors and caregivers.

2. Respondent, Terri Schiavo's husband and guardian, had financial and personal conflicts of interest that made it impossible for him adequately to protect her interests.

3. Terri Schiavo had never been adequately represented at any point during the substituted judgment trial, either by Respondent, her husband and guardian, by a guardian *ad litem*, or by counsel.

4. The judge in the guardianship proceeding created a judicial conflict of interest when he undertook, in violation of Florida law, FLA. STAT. § 744.309(1)(b), to serve both as judge and surrogate for the ward.

5. These conflicts of interest so tainted the fact-finding process, that permitting Terri Schiavo to die of starvation and dehydration after the execution of the order without first examining whether her rights had been determined at a fair trial, would constitute a judicial deprivation of life without due process of law.

Those urging a "hands off" position pointed to the years of litigation[1], to the guardianship court's substituted judgment

---

[1] *In re Guardianship of Theresa Marie Schiavo*, 780 So. 2d 176, 177 (Fla. 2d DCA 2001) ("*Schiavo I*"); *In re Guardianship of Schiavo*, 792 So. 2d 551, 555 (Fla 2d DCA 2001) ("*Schiavo II*"); *In re Guardianship of Schiavo*, 800 So. 2d 640, 642 (Fla. 2001) ("*Schiavo III*"); *In re Guardianship of Schiavo*, 851 So. 2d 182, 185 (Fla. 2003) ("*Schiavo IV*"), review denied; *In re Guardianship of Schiavo*, 855 So. 2d 621 (Fla. 2003);

finding that Terri Schiavo would have chosen to forego nutrition and hydration under the circumstances [App. 8], and to Florida's constitutional right to privacy. FLA. CONST. art. I § 23 .

Concerned that Terri Schiavo's rights to procedural due process, equal protection, fair trial, and adequate representation were violated by the guardianship court prior to the execution of its final order on October 15, 2003, and that allowing her to die under the circumstances would violate her rights to due process and self-determination under federal and Florida law, the Legislature created a remedy that closely resembles a clemency or *habeas corpus* proceeding. Chapter 2003-418, Florida Laws (referred to herein as "Chapter 2003-418"), was adopted on October 21, 2003. The full text of the statute has been set forth above and is attached as Appendix 4.

Acting pursuant to the authority granted by the Legislature, the Governor issued Executive Order No. 03-201 on October 21, 2003, reinstituting the provision of nutrition and hydration to Terri Schiavo pending receipt of the guardian *ad litem*'s report. [App. 5].

As implemented, the remedy had features similar to clemency proceedings employed in Florida capital cases[2]:

1) Review of the facts of the case and the fairness of the judicial process by the Governor[3];

Theresa Marie Schindler Schiavo, an Incompetent Ward, Incapacitated, by her Parents and Next Friends, Robert and Mary Schindler v. Michael Schiavo, Individually, and in his Capacity as Guardian of the Person of Theresa Marie Schindler Schiavo, Incapacitated, 2003 WL 22469905 (M.D. Fla., Sep 23, 2003); *Advocacy Center for Persons With Disabilities, Inc. v. Schiavo*, 2003 WL 23305833, 17 Fla. L. Weekly Fed. D 291 (M.D. Fla., Oct 21, 2003).

[2] *Compare* FLA. CONST. art. IV § 8 (Clemency); FLA. STAT. § 22.06 (Stay of Execution of Death Sentence). FLA. STAT. § 940.

2) Appointment by the chief judge of the circuit court of an independent guardian *ad litem* whose loyalties are to the ward alone[4]; and

3) A report to the chief judge and the Governor of the guardian *ad litem's* findings and conclusions[5], after which the Governor can either dissolve the stay, or seek such further relief on behalf of the ward as may be warranted under the circumstances.

Respondent challenged the facial and as applied constitutionality of Chapter 2003-418, alleging, among other things, that Chapter 2003-418 violates the separation of powers. The Governor sought a jury trial at which the facts supporting the facial and as applied constitutionality of Chapter 2003-418 and executive order could be established before an impartial fact-finder. *See* FLA. STAT. § 86.071 (permitting jury trials in declaratory judgment actions). In the Circuit Court's view, however, this case has only two material issues:

> For separation-of-powers analysis, the existence of that duly entered final judgment and the Governor's subsequent interference with it are the only essential factual issues.

Michael Schiavo v. Jeb Bush, Fla. Sixth Judicial Cir., No. 03-008212-CI-20, 2004 WL 980028 (Fla. Cir. Ct.) [App. 1 at *8].

---

[3] *Compare* FLA. STAT. § 940.03 (2004) (Application for executive clemency "may require the submission of a certified copy of the applicant's indictment or information, the judgment adjudicating the applicant to be guilty, and the sentence, if sentence has been imposed, and may also require the applicant to send a copy of the application to the judge and prosecuting attorney of the court in which the applicant was convicted, notifying them of the applicant's intent to apply for executive clemency.")

[4] *Compare* FLA R. CRIM. P. 3.851(b) "Appointment of Post-Conviction Counsel"; FLA. STAT. § 27.703 (specific conflicts of interest); FLA. STAT. § 940.

[5] *Compare* FLA. CONST. art. IV § 8(a) (clemency requires approval of two members of the cabinet).

The Circuit Court held that the Act was unconstitutional, retroactive legislation that "clearly attaches new legal consequences to Mrs. Schiavo's previously adjudicated privacy right" [App. 1 at *9], and that allowing the Governor to exercise the protective *parens patriae* power of the State after nutrition and hydration is withdrawn pursuant to court order constitutes a "clear" case of legislative and executive "intrusion into judicial functions." [App. 1 at *7]. The Florida Supreme Court, relying on this Court's judgment in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), held that the Act violates separation of powers principles:

> In this case, the undisputed facts show that the guardianship court authorized Michael to proceed with the discontinuance of Theresa's life support after the issue was fully litigated in a proceeding in which the Schindlers were afforded the opportunity to present evidence on all issues. This order as well as the order denying the Schindlers' motion for relief from judgment were affirmed on direct appeal. See *Schiavo* I, 780 So. 2d at 177; *Schiavo* IV, 851 So. 2d at 183. The Schindlers sought review in this Court, which was denied. Thereafter, the tube was removed. Subsequently, pursuant to the Governor's executive order, the nutrition and hydration tube was reinserted. Thus, the Act, as applied in this case, resulted in an executive order that effectively reversed a properly rendered final judgment and thereby constituted an unconstitutional encroachment on the power that has been reserved for the independent judiciary.

Bush v. Schiavo, 2004 WL 2109983, 29 Fla. L. Weekly S515 (Fla. No. SC04-925, Sep 23, 2004) [App. 2 at *8].

ARGUMENT

I. The Florida Supreme Court's Misapplication of the Separation of Powers Principles Enunciated in *Plaut v. Spendthrift Farm* Denied the Governor His Federal Due Process Rights and Prevented the State of Florida from Protecting the Due Process And Equal Protection Rights of Incompetent Persons Whose Nutrition and Hydration have been Withdrawn by Court Order.

A. The Florida Supreme Court Misapplied this Court's Ruling in *Plaut v. Spendthrift Farm*

Relying on this Court's decisions in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) and *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Florida Circuit Court held that legislative authorization for the Governor to assume protective jurisdiction of an incapacitated person denied nutrition and hydration pursuant to a judicial decree prior to his or her death violates the separation of powers. In the Circuit Court's view, Chapter 2003-418 "clearly attaches new legal consequences to Mrs. Schiavo's previously adjudicated privacy right" [App. 1 at *9], and the creation of the remedy constitutes a "clear" case of legislative and executive "intrusion into judicial functions." [App. 1 at *7].

The Florida Supreme Court affirmed, holding that, under the principles enunciated in *Plaut* and relevant Florida cases applying them, "the Act, as applied in this case, resulted in an executive order that effectively reversed a properly rendered final judgment and thereby constituted an unconstitutional encroachment on the power that has been reserved for the independent judiciary." [App. 2]. Petitioner submits that this reasoning both rewrites the order authorizing removal of the nutrition and hydration tube, and denied the Governor and his ward a meaningful opportunity to defend their federal due process rights.

As a result of this reasoning, it is now the law in Florida that *all* due process and equal protection questions involved in substituted judgment proceedings—including those that go to the integrity of the judgment itself—merge into the final decree authorizing the withdrawal of nutrition and hydration. In the Florida Supreme Court's view, the Legislature is now powerless to provide a means by which the Governor can exercise the protective *parens patriae* powers of the State to seek judicial review of the ward's due process and equal protection rights. The practical result is that the incapacitated ward has no means of redress for ineffective representation or where the decree is tainted by a judicial conflict of interest.

Petitioner submits that neither *Landgraf* nor *Plaut* require —or permit—such a result. Unless a substituted judgment decree effectuates *the patient's* wishes, it cannot in any meaningful way be said to have "adjudicated" her privacy right. If the trial that resolved the controversy over her privacy rights was tainted by ineffective representation, equal protection, and due process violations, the guardianship court's order is constitutionally suspect, and the Legislature must be free to adopt new remedies designed to redress those grievances. That is precisely what Chapter 2003-418 does.

1. *Chapter 2003-418 does not violate the separation of powers doctrine.*

The order of the guardianship court required that Respondent "shall cause the removal of the nutrition and hydration tube from the Ward, Theresa Marie Schiavo, at 2:00 P.M. on the 15th day of October, 2003." The order was carried out when the tube was withdrawn. The Florida Supreme Court, however, reads the order as requiring the *death* of the ward, and effectively rewrites the order. The order the Governor is *charged* with violating (as opposed to the one entered) mandates that Respondent "shall cause the removal of the nutrition and hydration tube from the Ward,

Theresa Marie Schiavo, at 2:00 P.M. on the 15th day of October, 2003" *and shall continue to withhold nutrition and hydration from her until she is dead.*

It is undisputed that Chapter 2003-418 was adopted on October 21, 2003, *six days after* the tube was withdrawn in accordance with the guardianship court's order. Unlike the law in *Plaut*, where Congress attempted a retroactive change in the law designed to reopen a prior judgment, or the law involved in *Landgraf*, where the issue was whether a substantive change in the law should be applied retroactively to cases pending on appeal after final judgment, Chapter 2003-418 has only prospective effect. It creates a new remedy akin to a clemency or *habeas corpus* proceeding, and authorizes the Governor to assert protective jurisdiction of persons in Terri Schiavo's situation in order to ensure that *her* rights are protected before death negates them forever. FLA. CONST. art. IV § 1 ("The governor shall take care that the laws be faithfully executed . . . .")

Petitioner respectfully submits that neither *Landgraf* nor *Plaut* supports the proposition that the political branches must sit idly by and ignore colorable claims that a manifest injustice will occur if an incompetent ward is allowed to die before the equal protection and due process claims advanced on her behalf by the Governor can be investigated. Read together, both cases support what the Governor and the Legislature have done.

2. *The Florida Supreme Court's Holding Limits the State's Ability to Comply with the Fourteenth Amendment.*

This Court has recognized that the right of an incapacitated person "to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right . . . must be exercised for her, if at all, by some sort of surrogate." *Cruzan v. Director, Missouri Department of Health*, 497 U.S.

261, 280 (1990). *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990), the Florida Supreme Court also recognized that "[t]he question [in substituted judgment proceedings] is who will exercise this right and what parameters will limit them in the exercise of this right." *Browning*, 568 So.2d at 12, *quoting John F. Kennedy Memorial Hosp., Inc. v. Bludworth*, 452 So. 2d 921, 924-925 (Fla. 1984).

Chapter 2003-418 authorizes the Governor to serve as proxy for incapacitated persons where family members challenge either the findings or the fairness of a substituted judgment proceeding that results in an order to withhold nutrition and hydration. The Florida Supreme Court's decision striking the law on separation of powers grounds creates federal constitutional problems.

One problem arises because a judicial decree authorizing withholding of nutrition and hydration will inevitably result in the death of the incapacitated ward. The only constitutional justification for such an order rests on the premise that the purpose of the order is not to cause the death of the ward, but rather to effectuate the ward's substituted judgment concerning the continuation of artificial nutrition and hydration. *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 280 (1990). Where, as here, it is alleged that the decree itself violates the federal due process and equal protection rights of the ward, separation of powers cannot be a defense in an action by the State itself to protect the ward's rights.

Substituted judgment proceedings are permissible *only* in the case of persons with cognitive disabilities that make it impossible for them to make independent, fully informed choices regarding the nature and duration of their medical treatment. Since persons with severe cognitive disabilities have the same rights to procedural due process and equal protection enjoyed by others, the separation of powers doctrine guarantees that each of the three branches of state government has an *independent* role in ensuring that surrogates—

whoever they may be—protect the rights of their incapacitated wards. See *Jackson v. Indiana*, 406 U.S. 715 (1972) (unjustified commitment); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (abuse & neglect in state hospitals); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (irrational discrimination in zoning).

The Florida Legislature exercised its authority by enacting detailed procedures defining the duties of proxies, guardians, and surrogates. FLA. STAT., §§ 744.101 *et. seq.*. (surrogates and guardians), § 765.401 (proxies). Notably, it has strictly forbidden any sort of conflict of interest on the part of a judge, proxy, or guardian. FLA. STAT. § 44.309. It has defined the procedures to be followed by persons wishing to make an advance directive or appoint a health care proxy, FLA. STAT., Ch. 765, and has defined the duties of courts called upon to ascertain the intent of an individual who, like Terri Schiavo, has been diagnosed as being in a PVS and has left no written advance directive. FLA. STAT. § 765.404.

Read together with the decisions of this Court and relevant Florida case law, these statutes define the nature and scope of the protection and process due *to the incapacitated person* when a Florida court authorizes a guardian, surrogate, or proxy to withhold or withdraw life-sustaining treatment. Florida Laws, Chapter 2003-418 merely adds an additional layer of due process protection, and guarantees that death will not extinguish the ward's rights to due process and equal protection.

The Florida courts' power is exclusively judicial. They supervise the conduct of proxies and other litigants before them and decide substituted judgment cases brought by those who seek to withhold or withdraw life-sustaining treatments. Where, as here, the judicial *process* is alleged to be tainted by conflict of interest, the Fourteenth Amendment certainly permits the Legislature and the Governor to satisfy themselves

that the incapacitated ward will not be deprived of her life without due process of law.

The Governor's authority to "faithfully execute" state and federal laws protecting the rights, privileges, and immunities guaranteed to all within the jurisdiction of the State of Florida by the Fourteenth Amendment, including those whose rights have been violated by a judicial decree entered by a Florida court is confirmed by the Supremacy Clause. U.S. CONST. art. VI; U.S. CONST. amend. XIV § 1; FLA. CONST. art. IV § 1 ("The governor shall take care that the laws be faithfully executed, ..."). The executive can exercise either the authority he has under existing law, or, as in this case, propose new legislation that would either confer the authority needed to redress the grievance or change the law to negate the prospective effect of the questionable ruling. *See, e.g., Landgraf v. USI Film Products*, 511 U.S. 244 (1994) ("Purely prospective application [of changes in the law] would prolong the life of a remedial scheme, and of judicial constructions of civil rights statutes, that Congress obviously found wanting."). *See generally* Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1989-1990).

The Florida courts have blurred the distinction between the independent roles of the three branches in substituted judgment cases. This Court should grant the writ, and reaffirm the State's power to ensure the equal protection and due process rights of persons with severe cognitive disabilities in substituted judgment proceedings.

B. The Florida Supreme Court Ruling Violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment

The due process issue the Legislature sought to correct focused on the guardianship judge's simultaneous service as judge and proxy. The Legislature was no doubt also concerned about the lack of equal protection afforded the

incapacitated wards in guardianship court. In the aftermath of *Schiavo* decisions, Florida law, as developed and applied by its courts, leaves without protection from judicial conflicts only those whose mental disabilities are so severe that a substituted judgment approach is the only way to protect their rights.

In the case at bar, the due process and equal protection problems are embedded in the rule, announced by the District Court of Appeal in *Schiavo I*, allowing judges to serve as surrogates, and they became a part of Florida constitutional law when the Florida Supreme Court affirmed the guardianship decision. *In re Guardianship of Schiavo,* 789 So. 2d 348 (Fla. 2001) (Table), aff'g *In re Guardianship of Theresa Marie Schiavo*: *Schindler v. Schiavo*, 780 So. 2d 176, 177 (Fla. 2d DCA 2001).

Because Chapter 2003-418 applies only to incapacitated individuals whose rights "must be exercised for [them], if at all, by some sort of surrogate," most states, including Florida, have adopted statutes that prescribe detailed procedures that must be followed by guardians and surrogates; FLA. STAT., §§ 744.101 *et. seq.* (surrogates and guardians), § 765.401 (the proxy); by persons who wish to make an advance directive or appoint a health care proxy, FLA. STAT., Ch. 765; and by courts charged with the responsibility of ascertaining the intent of an individual who has left no advance directive and who, like Terri Schiavo, has been diagnosed as being in a PVS. FLA. STAT. § 765.404.

In each of these situations, the Florida Legislature has made it clear that proxies, surrogates, and the courts that supervise them must be untainted by any possible conflict of interest. FLA. STAT. § 744.309 (1)(b) provides, in relevant part:

> (1) (b) No judge shall act as guardian after this law becomes effective, except when he or she is related to the ward by blood, marriage, or adoption, or has

> maintained a close relationship with the ward or the ward's family, and serves without compensation.

See also FLA. STAT. § 744.309 (3) ("The court may not appoint a guardian in any other circumstance in which a conflict of interest may occur.").

In the case at bar, the conflict of interest that Chapter 2003-418 sought to ameliorate is not only firmly embedded in the law of the Schiavo guardianship case, but also in the fabric of Florida constitutional law. In *Schiavo* I[6], the guardianship court faced a dilemma. Respondent, Michael Schiavo, had petitioned for an order authorizing withdrawal of nutrition and hydration. Terri's father, Robert Schindler, objected. He alleged that Respondent should be disqualified from serving as Terri's guardian and surrogate because Mr. Schiavo stood to inherit the balance of a malpractice award against the doctor who treated Terri at the time of her brain injury.

Recognizing that "there may be occasions when an inheritance could be a reason to question a surrogate's ability to make an objective decision," *Id.*, the Court of Appeal held that *the guardianship court itself* had jurisdiction to serve as surrogate decision-maker for Terri Schiavo:

> Because Michael Schiavo and the Schindlers could not agree on the proper decision and the inheritance issue created the appearance of conflict, Michael Schiavo, as the guardian of Theresa, invoked *the trial court's jurisdiction to allow the trial court to serve as the surrogate decision-maker.*"

Schiavo I, 780 So.2d at 178 (emphasis added).

Petitioner submits that the Due Process Clause does not permit judges to serve in the dual capacity of health-care

---

[6] *In re Guardianship of Theresa Marie Schiavo*: *Schindler v. Schiavo*, 780 So. 2d 176, 177 (Fla. 2d DCA 2001), aff'd without opinion *In re Guardianship of Schiavo*, 789 So. 2d 348 (Fla. 2001) (Table)

surrogate and judge. Florida's guardianship statutes, Florida Laws, Chapter 744, expressly prohibit such conflicts of interest. So too does Florida constitutional law. In *In re TW*, 551 So. 2d 1186, 1190 n. 3 (Fla. 1989), the Florida Supreme Court held:

> . . . Under no circumstances is a trial judge permitted to argue one side of a case as though he were a litigant in the proceedings. The survival of our system of justice depends on the maintenance of the judge as an independent and impartial decisionmaker. A judge who becomes an advocate cannot claim even the pretense of impartiality.

Accord, *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972); *In re Murchison*, 349 U.S. 133 (1955); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986).

This is precisely the situation the Legislature attempted to remedy with Chapter 2003-418. The Florida Supreme Court allows judges to serve as proxies *only* in substituted judgment cases where there are reasonable grounds to believe that those otherwise eligible to serve will not provide their ward with effective assistance. This, Petitioner submits, violates the ward's rights under the Due Process *and* Equal Protection Clauses. See *Tennessee v. Lane*, 124 S.Ct. 1978, 1989 & nn. 8-14 (2004) (recounting the history of discrimination against persons with disabilities); *Jackson v. Indiana*, 406 U.S. 715 (1972) (unjustified commitment); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (abuse & neglect in state hospitals); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (irrational discrimination in zoning).

After *Schiavo I*, which is the law of the guardianship case to which Respondent (but not the Governor) is a party, the *only* persons in the State of Florida who are not entitled to an impartial judge are incapacitated persons whose rights must be determined in substituted judgment proceedings. Petitioner submits that a due process violation of this magnitude that

exists *only* in the case of incapacitated persons also raises profound equal protection questions that extend far beyond the four corners of this particular case.

C. This Court Should Grant the Writ and Affirm the Power of State Legislatures to Structure the Process in which Substituted Judgment Decisions are Made for Incompetent Wards.

The Florida Legislature recognized the right of competent adults to refuse treatment, FLA. STAT. § 765.101. It also provided detailed guidelines for cases in which the right to self-determination must be made for an incapacitated person by a proxy. FLA. STAT. § 765.401. In every case, these rights are expressly made "subject to certain interests of society, such as the protection of human life and the preservation of ethical standards in the medical profession." FLA. STAT. § 765.102(1).

In the case at bar, the Florida Legislature faced *two* "unfortunate situations" that arose because disputes among family members made it impossible for them "to protect [their] patient." *Cruzan*, 497 U.S. at 281, *quoting In re Jobes,* 108 N.J. 394, 419, 529 A.2d 434, 447 (1987). The appearance of a conflict of interest on the part of both Respondent and Terri's parents made it inappropriate, in the guardianship court's opinion, for any of them to serve as Terri's surrogate. *See Schiavo I*, 780 So.2d at 178. The Governor submits that, at that point, the guardianship court was required by both the federal Due Process Clause and Florida law to appoint a proxy who would represent *only* Terri's interests, but it did not do so. The judge improperly tried to fill the gap by serving as both Terri Schiavo's surrogate and as the trial judge who would attempt to determine her present wishes. *Id.*

The case at bar therefore offers this Court an opportunity to clarify the ways in which the Due Process and Equal Protection Clauses of the Fourteenth Amendment shape the

relationship between the separation of powers and the preservation of individual rights in a setting where the person whose rights are to be adjudicated cannot speak for herself. Because the Florida Supreme Court refused even to consider the possibility that permitting a trial court to serve simultaneously as surrogate might have tainted the fact-finding process, it is now impossible for Florida's political branches to adopt post-judgment (but pre-death) remedies that will resolve these important federal due process and equal protection issues.

In *Cruzan*, this Court recognized that "[t]he choice between life and death is a deeply personal decision of obvious and overwhelming finality," and that a State has more particular interests at stake" when it elaborates and refines a process by which it will resolve conflicts between family members over the person's wishes or the fairness of the proceeding in which they were determined. Writing for the majority, the Chief Justice held:

> Whether or not Missouri's clear and convincing evidence requirement comports with the United States Constitution depends in part on what interests the State may properly seek to protect in this situation. Missouri relies on its interest in the protection and preservation of human life, and there can be no gainsaying this interest.

Cruzan, 497 U.S. at 280.

Petitioner respectfully submits that this Court should grant the writ and clarify the boundary between the political and judicial branches in this important, and emerging, field of law.

II. The Florida Supreme Court Violated the Federal Due Process Rights of the Governor and his Incompetent Ward When It Gave Preclusive Effect to Factual Findings in a Substituted Judgment Proceeding to which the Governor was Not a Party.

The Florida Supreme Court found that the Governor violated the Florida Constitution by taking action that "effectively reversed a properly rendered final judgment and thereby constituted an unconstitutional encroachment on the power that has been reserved for the independent judiciary" [App. 2]. Although it did not address Respondent's allegation that the Executive Order violated Terri Schiavo's privacy rights, it did hold Chapter 2003-418 unconstitutional "as applied to Terri Schiavo." [App. 2].

Petitioner disputed the material facts supporting both challenges and sought a jury trial, but the Circuit Court granted summary final judgment. [App. 1] In its view, only two facts were material to a finding that the Executive Order violated the principle of separation of powers: "For separation-of-powers analysis, the existence of that duly entered final judgment and the Governor's subsequent interference with it are the only essential factual issues." *Schiavo v. Bush*, ----- [App. 1 at p. 16].

Petitioner submits that as Governor and as the legislatively appointed proxy for his ward, Terri Schiavo, he was entitled under the Due Process Clause to a *de novo* hearing on all allegations in the complaint, including the ward's desires regarding the provision of nutrition and hydration. The Florida Supreme Court, by contrast, assumed that all relevant disputed fact questions were conclusively determined by the decree in the guardianship case:

> When the prescribed procedures are followed according to our rules of court and the governing statutes, a final judgment is issued, and all post-judgment procedures are

> followed, it is without question an invasion of the authority of the judicial branch for the Legislature to pass a law that allows the executive branch to interfere with the final judicial determination in a case. That is precisely what occurred here *and for that reason* the Act is unconstitutional as applied to Theresa Schiavo.

Schiavo v. Bush, [App. 2] (emphasis added).

A. The Due Process Clause of the Fourteenth Amendment Forbids Granting Preclusive Effect to Disputed Facts Developed in a Proceeding to which the Petitioner was not a Party.

The Governor was not a party to the action that authorized the withholding of nutrition and hydration from Terri Schiavo, nor is he in privity with any of them. In the words of the Circuit Court: "[h]e was, and remains, a stranger to Mrs. Schiavo's guardianship proceeding[, whose] only colorable legal interest in Mrs. Schiavo derives from the Act that is the subject of this declaratory action." *Schiavo v. Bush*, ___ [App. 1 at p. 16] Accordingly, the Governor was not bound by the findings of fact in the guardianship case. *Richards v. Jefferson County, Alabama*, 517 U.S. 793 (1996); *Hansberry v. Lee*, 311 U.S. 32 (1940). *See also Lockport v. Citizens for Community Action at Local Level, Inc.*, 430 U.S. 259, 263, n.7 (1977) (voting rights challenge by county residents not barred by county's prior suit).

Respondent challenged Chapter 2003-418 in a declaratory judgment action. Under Florida law, Respondent's burden was "to negate every conceivable basis which might support" the legislation, *Gallagher v. Motors Ins. Co*, 605 So. 2d 62, 68-69 (Fla. 1992), and the Governor was entitled to a jury trial to resolve disputed issues of fact. FLA. STAT. § 86.071. The Governor was entitled, therefore, to defend not only his power to "take care" that state and federal law governing the rights of incompetent wards would be "faithfully executed,"

but also to defend the Legislature's decision to invest him with the *parens patriae* power to serve as official proxy for all incompetent wards who met the criteria set forth in Chapter 2003-418. The Governor was authorized in that capacity to defend *Terri Schiavo's* procedural due process right to a fair substituted judgment hearing at which she was adequately represented. As this Court explained in *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930):

> We are not now concerned with the rights of the plaintiff on the merits, although it may be observed that the plaintiff's claim is one arising under the Federal Constitution and, consequently, one on which the opinion of the state court is not final. . . . Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support. . . . [W]hile it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. *Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.*

Id., at 681-682 (emphasis added).

B. The State of Florida is Authorized by the Fourteenth Amendment to Name the Governor Proxy for the Class of Vulnerable Individuals Described by Chapter 2003-418.

Not only did the Florida Supreme Court refuse the Governor the opportunity to defend the State's actions from Respondent's separation of powers and privacy attack, it also "reject[ed] the Governor's argument that this legislation provides an additional layer of due process protection to those

who are unable to communicate their wishes regarding end-of-life decisions." *Schiavo v. Bush*, [App. 2 at *12] In the Florida Supreme Court's view, "chapter 2003-418's standard-less, open-ended delegation of authority by the Legislature to the Governor provides no guarantee that the incompetent patient's right to withdraw life-prolonging procedures will in fact be honored." *Id.*, at *12. [App. 2 at *12]

Petitioner submits that the Florida Supreme Court's approach not only "begs the question" central to this Court's analysis in *Cruzan*, 497 U.S. at 280, but it also misses the central point of the case: *i.e.* that the "choice" to be protected is that of the *incompetent patient*, not that of either the court or of any other person. If, as the Legislature intended, the Governor was to serve as Terri Schiavo's proxy for the purpose of testing the adequacy of the process, his discretion to raise her equal protection and due process interests was coextensive with hers. Granting him her discretion could not, under *Cruzan*, violate either the decree (which purported to protect her interests), or the separation of powers.

In *Cruzan*, this Court held that Missouri's imposition of heightened evidentiary requirements was *one* acceptable means by which the State might "legitimately seek to safe-guard the personal element of this choice." *Id.*, at 281. This Court also implied, but did not decide, that the integrity—if not the constitutionality—of a substituted judgment order turns on the nature and quality of the representation provided by those charged with protecting those whose "'right' [to refuse treatment] must be exercised for her, if at all, by some sort of surrogate." *Id.*, at 280.

Effective representation is thus the *sine qua non* of *the incompetent person's* right to procedural due process in the substituted judgment proceeding. It is also the necessary precondition for the full implementation of the substantive rights the state sought in *Cruzan* to protect with its heightened evidentiary requirement. Given the nature of a substituted

judgment proceeding, inadequate representation is the one defect that neither the State, *as parens patriae*, nor the court, nor the parties can waive or otherwise avoid. Without effective representation, neither the parties, nor the State can be sure that the facts found by trial courts are constitutionally sufficient "substitutes" for the decisions incompetent wards would have made for themselves under the circumstances.

A decree in a substituted judgment case that authorizes withdrawal of nutrition and hydration is for all practical purposes, the functional equivalent of a judicially imposed death sentence. No doubt that is why even the dissenters in *Cruzan* recognized that *accuracy*, not finality, is the touchstone of all substituted judgment inquiries:

> As the majority recognizes, (citation omitted) Missouri has a *parens patriae* interest in providing Nancy Cruzan, now incompetent, with as accurate as possible a determination of how she would exercise her rights under these circumstances. Second, if and when it is determined that Nancy Cruzan would want to continue treatment, the State may legitimately assert an interest in providing that treatment. But *until* Nancy's wishes have been determined, the only state interest that may be asserted is an interest in safe-guarding the accuracy of that determination.
>
> Accuracy, therefore, must be our touchstone. Missouri may constitutionally impose only those procedural requirements that serve to enhance the accuracy of a determination of Nancy Cruzan's wishes or are at least consistent with an accurate determination.

Id. at 315-16, 318 (Brennan, Marshall, and Blackmun, JJ., dissenting) (emphasis in the original). Where, as here, Governor has made "a substantial showing of the denial of [a] federal right" on his own behalf and that of his ward, it was certainly within the power of the Legislature to provide a post-judgment review of the fairness of the process. *See*

Lochnar v. Thomas, 517 U.S. 314, 320 (1996) (discussing the reasons for granting a stay of execution in a pending *habeas corpus* proceeding) citing *Barefoot v. Estelle,* 463 U.S. 880, 891 & n. 4 (1983) (noting that "[i]n a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate of probable cause," and discussing the grounds for such a certificate: "that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further.") (internal quotes omitted)

Furthermore, like the Florida Legislature in this case, the Justices in *Cruzan* expressly distinguished cases in which the families agree from cases like this one in which there is a real controversy over the ward's wishes. *Id.* at 318. Given that this dispute over the constitutional rights of the ward will affect future substituted judgment cases in Florida, and perhaps in other states, this Court should grant the writ, vacate the judgment of the Florida Supreme Court, and remand with instructions to permit the Governor to address the ward's federal claims.

The Governor respectfully submits that to do otherwise would send a profoundly disturbing message to all who love and care for those with profound cognitive disabilities. If Terri Schiavo's proxy is precluded by the substituted judgment decree from arguing that her federal due process rights were denied by ineffective representation, so too is Terri Schiavo herself. This cannot be the meaning of either *Cruzan* or *Plaut*. *See* RESTATEMENT (2d) JUDGMENTS §42(1) ("A person is not bound by a judgment for or against a party who purports to represent him if: . . . (e) The representative failed to prosecute or defend the action with due diligence and reasonable prudence, and the opposing party was on notice of facts making that failure apparent.").

As Justice Brennan pointed out in his dissent in *Cruzan*:

> . . . In a hearing to determine the treatment preferences of an incompetent person, a court is not limited to adjusting burdens of proof as its only means of protecting against a possible imbalance. Indeed, any concern that those who come forward will present a one-sided view would be better addressed by appointing a guardian ad litem, who could use the State's powers of discovery to gather and present evidence regarding the patient's wishes. A guardian ad litem's task is to uncover any conflicts of interest and ensure that each party likely to have relevant evidence is consulted and brought forward--for example, other members of the family, friends, clergy, and doctors.

That is the situation in this case. Respondent argued that the findings in the guardianship proceeding must be treated as determinative. In his view, "determining Mrs. Schiavo's intent (again) is not material", and that it would be constitutionally irrelevant even if a "hundred juries" determined that the order had not comported with Terri Schiavo's wishes. (Respondent's Answer Brief, pp. 9, 16). Given this dispute, the Executive Order does precisely what is necessary to preserve the *status quo ante* while an unbiased guardian *ad litem* examines the facts and claims by her family that the courts violated her federal due process and equal protection rights.

CONCLUSION

The implications of the Florida Supreme Court's opinion for persons with disabilities are ominous. Individuals who are the subject of substituted judgment proceedings are among the most vulnerable of our citizens who cannot speak for themselves. With the passage of Chapter 2003-418, the Florida Legislature sought to address a problem that can, and most assuredly will, arise in substituted judgment cases whenever there is reason to believe that the trial was not fair

or has resulted in a miscarriage of justice. The Florida Supreme Court's use of the separation of powers doctrine to invalidate a remedy that closely resembles a clemency or *habeas corpus* proceeding has, in fact, created a uniquely vulnerable class of incompetent persons. The persons described by Chapter 2003-418 are the *only* persons in Florida who have no right to seek an independent, pre-execution review of their procedural due process rights.

It has taken our nation many years to make good on its commitment to equal justice for persons with profound cognitive disabilities. Unless the State of Florida retains the power to protect the rights of its most vulnerable citizens to due process and equal protection of the laws, the Fourteenth Amendment's guarantees will apply only to those who are capable of defending them on their own.

Petitioner respectfully submits that the Writ should be granted.

Respectfully submitted,

KENNETH L. CONNOR
CAMILLE GODWIN
WILKES & MCHUGH, P.A.
One North Dale Mabry
Suite 800
Tampa, Florida 33609
(813) 873-0026

ROBERT A. DESTRO *
3600 John McCormack Rd., N.E.
Washington, D.C. 20064
(202) 319-5202

* Counsel of Record

Counsel for Petitioner
Jeb Bush, Governor of Florida

December 1, 2004

APPENDICES

APPENDIX A

IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA CIRCUIT

[Filed May 14, 2004]

CIVIL CASE NO. 03-008212-CI-20

MICHAEL SCHIAVO, as Guardian of the person of THERESA MARIE SCHIAVO,
Petitioner,

vs.

JEB BUSH, Governor of the State of Florida, and CHARLIE CRIST, Attorney General of the State of Florida,
Respondents.

SUMMARY FINAL JUDGMENT

THIS CAUSE came before the court on Petitioner's Motion for Summary Judgment, with a certificate of service date of November 24, 2003. The court, having reviewed the motion, considered the argument of the attorneys, and having considered the following briefs: "Petitioner's Brief"; "Brief of Respondent Jeb Bush, Governor of the State of Florida"; "Amicus Curiae Brief of Terry Schiavo's Parents Mary and Robert Schindler Supporting Respondents"; and "Brief of Amicus Speaker of the House on the Issue of Separation of Powers," finds that there is ample undisputed record evidence before this court to conclusively demonstrate the unconstitutionality of Ch. 2003-418, Laws of Fla., and the Governor's actions pursuant to its terms. Chapter 2003-418, is unconstitutional, both on its face and as applied to Mrs. Schiavo.

I.

Facial Unconstitutionality

Ch. 2003-418, Laws of Fla., (occasionally referred to herein as the "Act") is unconstitutional on its face because it is an unconstitutional delegation of legislative power to the Governor and because it unjustifiably authorizes the Governor to summarily deprive Florida citizens of their constitutional right to privacy. In both instances, these are pure questions of law that require no evidentiary support under any conceivable circumstance.

A. *Unconstitutional Delegation of Legislative Power*

Art. II, § 3, Fla. Const., provides that "[t]he powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." This principle, embedded in both the State and Federal constitutions, that the three branches are to be independent and separate of each other, exemplifies the concept of separation-of-powers. *Chiles v. Children A, B, C, D, E, and F*, 589 So.2d 260 (Fla. 1991). It is a safeguard designed precisely to prevent the concentration of power in the hands of one branch. *In re Advisory Opinion to the Governor*, 276 So.2d 25 (Fla. 1973).

The separation-of-powers doctrine "encompasses two fundamental prohibitions. The first is that no branch may encroach upon the powers of another. The second is that no branch may delegate to another branch its constitutionally assigned power." *Chiles*, 589 So.2d at 264. The Act and the Governor's executive order issued pursuant to its terms violate both prohibitions. It is the second branch of the separation-of-powers prohibition, unconstitutional delegation of legislative power, which renders chapter 2003418 unconstitutional on its face.

A legislative delegation of power to another branch of government without proper standards and guidelines violates Florida's separation-of-powers prohibition because it permits the other branch, the discretion to decide what the law shall be. See *Askew v. Cross Key Waterways*, 372 So.2d 913 (Ha. 1978); *Conner v. Joe Hatton, Inc.*, 216 So.2d 209 (Fla. 1968). This concept is so fundamental and universally accepted that the Florida Supreme Court considers it "hornbook law." *Lewis v. Bank of Pasco County*, 346 So.2d 53 (Fla. 1976). A statute which delegates power to the executive must so clearly define that power that the executive is precluded from acting through whim, showing favoritism, or exercising unbridled discretion. *Id* at 56. "No matter how laudable a piece of legislation may be in the minds of its sponsors, objective guidelines and standards should appear expressly in the act or be within the realm of reasonable inference from the language of the act where a delegation of power is involved and especially so where the legislation contemplates a delegation of power to intrude into the privacy of citizens." *Smith v. Portante*, 212 So.2d 298, 299 (Fla. 1968).

Standards and guidelines are also necessary to accommodate the right to judicial review. "When legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the Legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of the law." *Askew*, 372 So.2d at 918. Chapter 2003-418 contains no guidelines, no standards, no reference whatsoever to the individual privacy rights of those who fall within its terms, which would serve to limit the Governor from exercising completely unrestricted discretion in applying the law to their lives.

Counsel for the Governor argues in his Memorandum of Law in Opposition to the Petitioner's Motion for Summary Judgment that chapter 2003-418 should be read "in para-

material (*sic*) with other Florida Statutes relating to guardianship and end-of-life issues." Counsel for the Governor then suggests that pursuant to this canon of statutory interpretation, the Act authorizes the Governor to serve as a proxy and to enter a one-time stay on behalf of Mrs. Schiavo under the general provisions of § 765.401, Fla. Stat.(2003). The use of canons of statutory interpretation is certainly appropriate when the language of a statute creates some ambiguity regarding legislative intent. However, "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984); *McLaughlin v. State*, 721 So.2d 1170 (Fla. 1998); *Brown v. State*, 848 So.2d 361 (Fla. 4th DCA 2003). Here, the statutory language is crystal clear. The Legislature assigned to the Governor the unfettered discretion to control the nutrition and hydration, indeed the life or death, of a limited class of Florida citizens. There is nothing in the plain statutory language that is vague or ambiguous. Its purpose is readily apparent and straightforward. Under those circumstances, it is not necessary to resort to the *in pari materia* canon of statutory interpretation to discern the Legislature's intent. To do so would infer the existence of some textually unannounced standards.

It must be assumed that the Legislature was aware of the existing provisions of Florida Statutes, chapter 765, and the constitutionally protected right to the privacy of personal medical decisions under Art. I, § 23, Fla. Const. *Williams v. Jones*, 326 So.2d 425 (Fla. 1975) ([T]he Legislature is presumed to know the existing law when it enacts a statute and is also presumed to be acquainted with the judicial construction of former laws on the subject concerning which a later statute is enacted.). Indeed, on page 28 of the Governor's memorandum of law in opposition to Petitioner's motion for summary judgment the Governor suggests that the

Act "provides an additional layer of certainty that the patient's actual desires will be carried out." This is an extraordinary assertion, considering the Act contains no language that makes even the slightest reference to those desires, much less suggesting that the Governor is compelled to act in accordance with them.

The terms of the Act affirmatively confirm the discretionary power conferred upon the Governor. He is given the "authority to issue a one-time stay to prevent the withholding of nutrition and hydration from a patient" under certain circumstances, but he is not required to do so. Likewise, the Act provides that the Governor "*may* lift the stay authorized under this act at any time. The Governor *may* revoke the stay upon a finding that a change in the condition of the patient warrants revocation." (Emphasis added). In both instances, there is nothing to provide the Governor with any direction or guidelines for the exercise of this delegated authority. The Act does not suggest what constitutes "a change in the condition of the patient" that could "warrant revocation." Even when such an undefined "change" occurs, the Governor is not compelled to act. The Act confers upon the Governor the unfettered discretion to determine what the terms of the legislation mean and when, or if, he may act under it.

Based upon the Act's clear expression of legislative intent, the court finds that chapter 2003-418 constitutes an unconstitutional delegation of legislative power. This constitutional infirmity appears as a matter of law on the face of the Act itself and requires no additional evidence to demonstrate its existence. However, the unlawful delegation of legislative power is not the only basis upon which the Act is facially unconstitutional.

B. *Unconstitutional Authority to Interfere with Right of Privacy*

Art. I, § 23, Fla. Const., provides that "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life . . ." This specific right to privacy, not found in the United States Constitution, was enacted in 1980 by the citizens of Florida to expressly provide a broader protection of privacy than that available under the Due Process Clause of the Federal constitution. *Winfield v. Division of Pari-Mutuel Wagering, Dep 't of Business Regulation*, 477 So.2d 544 (Fla. 1985). The right includes a person's right of self-determination to control his or her own body and guarantees that "a competent person has the constitutional right to choose or refuse medical treatment, and that the right extends to all relevant decisions concerning one's health." *Guardianship of Browning v. Herbert*, 568 So.2d 4, 11 (Fla. 1990). Moreover, the right "should not be lost because the cognitive and vegetative condition of the patient prevents a conscious exercise of the choice to refuse further extraordinary treatment." *John F. Kennedy Memorial Hospital, Inc. v. Bludworth*, 452 So.2d 921, 924 (Fla. 1984). Thus, the privacy right to choose or refuse medical treatment applies to competent and incapacitated persons alike. *Browning*, 568 So.2d at 12.

In the case of an incapacitated person, the right "may be exercised by proxies or surrogates such as close family members or friends." *Id.* at 13. In exercising another's right of self-determination, "[t]he surrogate decisionmaker must be confident that he or she can and is voicing the *patient's* decision. *Id.* The decisionmaker "must be able to support that decision with clear and convincing evidence." *Id.* at 15. A written declaration of the patient's wishes "establishes a rebuttable presumption that constitutes clear and convincing evidence of the patient's wishes." *Id.* at 16. However, in a

case where the patient has not executed a written declaration, oral evidence "may constitute clear and convincing evidence." *Id.*

There can be no question that every "patient" who conceivably falls within the terms of the Act possesses a constitutionally guaranteed right to the privacy of his or her personal medical decisions. The Act, in every instance, ignores the existence of this right and authorizes the Governor to act according to his personal discretion. By substituting the personal judgment of the Governor for that of the "patient," the Act deprives every individual who is subject to its terms of his or her constitutionally guaranteed right to the privacy of his or her own medical decisions. As suggested by the Petitioner, even in those instances where the desires of the "patient" correspond with the actions of the Governor, the Act is still unconstitutional because the Governor is not required to consider, much less act in accord with, those desires. It is the unrestricted power to act, regardless of the individual's right of privacy, which creates this fatal constitutional infirmity on the face of the Act.

Although the Act facially interferes with the privacy of all individuals who fall within its terms, that does not end the constitutional inquiry. If the Governor can demonstrate the existence of a compelling state interest that would justify that interference, and if the interference is accomplished by the least intrusive means available, the Act may yet pass constitutional muster. This court must therefore address these issues in order to determine the existence of facial unconstitutionality based upon interference with the right of privacy.

"Florida's right of privacy is a fundamental right warranting `strict' scrutiny." *North Florida Women's Health and Counseling Services, Inc.*, 866 So.2d 612 (Fla. 2003). As such, the state has an obligation not to intrude upon an individual's desires regarding life-prolonging procedures unless there is "a compelling interest great enough to override

this constitutional right." *Browning*, 568 So.2d at 14. Florida courts have held that an individual's right to forego life-prolonging procedures requires a balancing of the patient's privacy interests against the state's interests in the preservation of life, the prevention of suicide, the protection of innocent third parties, and maintenance of the ethical integrity of the medical profession. *Id. See also In re Guardianship of Barry*, 445 So.2d 365 (Fla. 2d DCA 1984); *Satz v. Perlmutter*, 362 So.2d 160 (Fla. 4th DCA 1978) *affirmed with opinion*, 379 So.2d 359 (Fla. 1980).

Of these specific state interests, the most significant is the preservation of life. However, the state's interest in preserving life does not override an individual's personal choice regarding his or her own medical treatment decisions. Moreover, the state's interest in preserving life is strengthened or weakened based upon whether the person's affliction is curable or incurable. *Browning*, 568 So.2d at 14. Here, the Act in question only authorizes the Governor to act when "[t]he court has found the patient to be in a persistent vegetative state." Specifically under those circumstances, "the state's interests do not outweigh the right of the individual to forego life-sustaining measures." *Browning*, 568 So.2d at 14. The court therefore finds that the state's interests are insufficient to override privacy interests of any individual who falls within the terms of the Act.

The potential state interests suggested by the Governor are identical to those previously discussed and resolved by the Florida Supreme Court in *Browning*. This court is not required to entertain evidence of the existence of some suggested compelling state interest, if the alleged interest is one that has been previously judicially determined to be legally insufficient to justify government interference with a person's constitutional right of privacy. Additionally, the

Governor suggests that, pursuant to Art. I, § 2, Fla. Const., the state has a compelling interest in "ensuring that people with disabilities are not deprived of rights because of their disabilities." However, the Florida Supreme Court in *Browning* conclusively resolved the question of whether a. disabled person still retains the personal privacy right to control his or her own medical treatment decisions. As a consequence, the Governor is foreclosed from claiming that the existence of a disability now somehow justifies the state interference authorized by the Act.

Since the Governor has not articulated the existence of a compelling state interest sufficient to override the right of privacy regarding the discontinuation of life-prolonging medical procedures, there is little need to extensively analyze whether the challenged Act exercises its function in the least intrusive means possible. *Winfield*, 477 So.2d at 547; *In re T.W.*, 551 So.2d 1186 (Fla. 1995); *B.B. v. State*, 659 So.2d 256 (Fla. 1995). But some comment is warranted. The Florida Supreme Court has recognized that governmental interference with a citizen's right of privacy by the least intrusive means requires adherence to procedural safeguards which, at a minimum, necessitates judicial approval . prior to the state's intrusion. *Shaktman v. State*, 553 So.2d 148 (Fla. 1989). The Act does not include any judicial oversight such as that provided in §765.105, Fla. Stat. (2003), or any other procedural due process safeguards. This court finds that authorizing the Governor to exercise unbridled discretion in making the ultimate decision regarding the life or death of a private Florida citizen, without. standards, direction, review, or due process protection of that citizen's private desires, exceeds any reasonable concept of "least intrusive means."

This court must assume that this extraordinary legislation was enacted with the best intentions and prompted by sincere motives. However, as the highly respected constitutional

lawyer and Senator, Daniel Webster (17824 852), is widely credited with observing:

> Good intentions will always be pleaded for every assumption of authority. It is hardly too strong to say that the Constitution was made to guard the people against the dangers of good intentions. There are men in all ages who mean to govern well, but they mean to govern. They promise to be good masters, but they mean to be masters.

To preserve the promise of individual liberty and freedom, the Florida Constitution guarantees to every citizen the right to be the master of his or her own personal private medical decisions. Chapter 2003-418 authorizes an unjustifiable state interference with the privacy right of every individual who falls within its terms without any semblance of due process protection. The statute is facially unconstitutional as a matter of law.

II.

"As Applied" Unconstitutionality

As previously indicated, the Act authorizes the Governor to issue a stay and to restore nutrition and hydration to a certain population of "patients" in his sole discretion. However, the Governor is not *required* to do so. The fact that the Governor chose to issue a stay that affected Mrs. Schiavo implicates the constitutional separation-of-powers prohibition against executive encroachment into judicial powers. To the extent that chapter 2003-418 authorized such an encroachment, it is unconstitutionally retroactive legislation.

Undisputed Relevant Facts

The only material facts relevant to an "as applied" analysis of the constitutionality of chapter 2003-418 and the Gov-

ernor's executive order on the grounds of violation of separation-of-powers and unconstitutionally retroactive legislation are the following:

1. "Petitioner is the duly appointed guardian of the person of Theresa Marie Schiavo." (*Respondent's Statement for Case Management Conference, paragraph 2.a.; case management conference, transcript at page 16, line 1.*)

2. "Theresa Marie Schiavo had no written advance directive." (*Respondent's Statement for Case Management Conference, paragraph 2. f; case management conference, transcript at page 18, line 3.*)

3. The parties stipulated that the court was authorized to take judicial notice of the identified February 11, 2000, November 22, 2002, and September 17, 2003 orders of the guardianship court. (*Case management conference, transcript at page 11, line 16, through page] S, line 14.*)

4. "A court has found Theresa Marie Schiavo to be in a persistent vegetative state." (*Respondent's Statement for Case Management Conference, paragraph 2.g.; case management conference, transcript atpage 16, line 8.*)

5. "Prior to the enactment of :0ublic law] 03[-]418 that the feeding and hydration tubes had been removed from Theresa Schiavo." (*Case management conference, transcript at page 10, line 25.*)

6. The parties' counsel stipulated to correct copies of the subject statute and executive order, which were submitted to the court. (*Case management conference, transcript atpage 9, line 12, through page 10, line 22.*)

7. "The parents of Theresa Marie Schiavo have challenged the withholding of nutrition and hydration," in the context of the executive order. (*Respondent's*

Statement for Case Management Conference, paragraph 2.i.; case management conference, transcript at page 19, line 2.)

8. On October 21, 2003, pursuant to HB 35-E, the Governor issued Executive Order No. 03-201, issuing a one-time stay for Mrs. Schiavo and resuming the provision of nutrition and hydration to her. (*Case Management Conference, page 9, line 5 through page 11, line 15.*)

9. On October 21, 2003, "pursuant to the Governor's Executive Order, Theresa Schiavo was removed from her residence at a local hospice," and brought to a hospital, all "without the consent of her husband and duly appointed guardian," to effectuate "the reinsertion of an artificial means for nutrition and hydration." (*Admission of respondents' counsel as reflected in paragraph 2 of this Court's November 14, 2003 order vacating automatic stay; transcript of hearing on request for temporary injunction, page 26, line 21.*)

10. "Pursuant to the executive order of the Governor[,] that subsequently the feeding and hydration tubes were reinserted." (*Case management conference, transcript at page 11, line 9.*)

Each of the above facts is uncontroverted by the parties.

A. *Unlawful Encroachment Upon Judicial Power*

This is the other aspect of the separation-of-powers doctrine previously discussed in the examination of the unlawful delegation of legislative power. "[Each branch of government has certain delineated powers that the other branches of government may not intrude upon." *Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles*, 680 So.2d 400, 407 (Fla. 1996). The power of the judiciary is "not merely to rule on cases, but to *decide them, subject to review*

only by superior courts." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995). Thus, among other things, under the separation-of-powers doctrine, a final judgment of a court cannot be undone by legislation as to the parties before the court. *Id.* Any legislation that hampers judicial action or interferes with the discharge of judicial functions is unconstitutional. *State v. Simmons*, 36 So.2d 207 (Fla. 1948); *Walker v. Bentley*, 660 So.2d 313 (Fla. 2d DCA 1995). The prohibition against intrusion into judicial functions by legislation also applies to executive branch encroachment. *Hall v. Moore*, 777 So.2d 1105 (Fla. 1 S' DCA 2001); *Advisory Opinion to the Governor*, 213 So.2d 716 (Fla. 1968); *In the Matter of the Appointment and Removal of the Janitor of the Supreme Court*, 1874 WL 3391 (Wis.). Clearly, there has been such an encroachment in this case.

The judicial branch ruled on this matter with finality. Following over six years of litigation, the guardianship court entered its order of September 17, 2003, pursuant to a specific mandate from the Second District Court of Appeal, which required the Petitioner to remove the nutrition and hydration tube from Mrs. Schiavo. All appeals were exhausted and the parties agree that the tube was in fact removed in compliance with the order.

Notwithstanding the court's order, on October 21, 2003, the Florida Legislature enacted HB 35-E, the Governor signed it into law, and on the same day issued executive order No. 03-201, whereby he ordered the reinsertion of Mrs. Schiavo's nutrition and hydration tube. The executive order, in effect, reversed a properly rendered final judgment outright, thereby constituting a forbidden encroachment upon the power that has been reserved for the independent judiciary in contravention of the separation-of powers doctrine. "Having achieved finality . . . a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and [the legislature] may

not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was." *Plaut*, 514 U.S. 211 at 227. Because the Governor interfered with the court's prior final adjudication of Mrs. Schiavo's rights through the exercise of powers textually assigned by the Constitution to the *judiciary, his executive order is unconstitutional. B*.H. v. State, 645 So.2d 987, 992 (Fla. 1994). As Justice Antonin Scalia succinctly acknowledged in *Plaut*:

> Not favoritism, nor even corruption, but *power* is the object of the separation-of-powers prohibition. The prohibition is violated when an individual final judgment is legislatively rescinded for even the *very best* of reasons, such as the Legislature's genuine conviction (supported by all the law professors in the land) that the judgment was- wrong; and it is violated 40 times over when 40 final judgments are legislatively dissolved. *Plaut*, 514 U.S. at 228.

Here, under the guise of a legislative grant of discretionary authority, the Governor, in effect, rescinded the duly entered final judgment that vested in Mrs. Schiavo the right to discontinue further life-prolonging medical procedures. *Bush v. Schiavo*, 861 So.2d 506 (Fla. 2d DCA 2003) ("On the day that chapter 2003-418 became law, [the Governor] exercised the authority it conveyed to him and ordered the reintroduction of hydration and sustenance to Mrs. Schiavo, effectively overruling the order of the probate division of the circuit court undertaken as a result of this court's mandate in *Schindler v. Schiavo (In re Guardianship of Schiavo)*, 851 So.2d 182 (Fla. 2d DCA), *review denied*, 855 So.2d 621 (Fla. 2003)"). The factual basis for this court's determination regarding this issue is simply the following uncontroverted facts:

1. The existence of the final judgment in the guardianship procedure.

2. The stipulated fact that the feeding and hydration tube had been removed pursuant to that order.

3. The enactment of the legislation which is the subject matter of this action.

4. The Governor's executive order issued pursuant to its terms.

5. The stipulated fact that the nutrition and hydration tube was surgically reinserted in compliance with the executive order.

The Governor argues that the "Petition relies upon legal conclusions and 'borrowed facts' gleaned from legal proceedings to which the Governor was not a party and thus had no opportunity to cross examine witnesses or otherwise participate. As such, *res judicata* and collateral estoppel do not apply here." That argument is misplaced, if not misleading. The Governor was not a party to the prior guardianship litigation because he had nc legally cognizable interest that would support his participation. He was, and remains, a stranger to Mrs. Schiavo's guardianship proceeding. His only colorable legal interest in Mrs. Schiavo derives from the Act that is the subject of this declaratory action. The legal issue in this litigation is the propriety of the Governor's interference with a previously entered final judgment, not the propriety of the guardianship proceedings. This court would agree with the Governor that *res judicata* and collateral estoppel do not apply in this case. They don't apply because the facts in the guardianship proceeding have no relevance to the issue of the constitutionality of chapter 2003-418. Petitioner has not attempted, nor is he required, to reestablish in this declaratory action the factual basis for the final judgment that was previously issued in the guardianship proceedings. For separation-of-powers analysis, the existence

of that duly entered final judgment and the Governor's subsequent interference with it are the only essential factual issues. Both have been established by stipulation.

As it has been applied to Mrs. Schiavo, the Governor's executive order promulgated pursuant chapter 2003-418 constitutes an unconstitutional exercise of judicial power that violates the separation-of-powers provisions of Art. II, § 3, Fla. Const.

B. *Unconstitutionally Retroactive Legislation*

To the extent that the Act which is the subject matter of this declaratory action authorized the Governor to compel the reinsertion of Mrs. Schiavo's nutrition/hydration tube after her right to the removal of that tube had been judicially approved and ordered, it is unconstitutionally retroactive legislation.

A retroactive statute is one that "purports to determine the legal significance of acts or events that have occurred prior to the date of its enactment." Ray H. Greenblatt, *Judicial Limitations on Retroactive Civil Legislation*, 51 Nw. U.L. Rev. 540, 544 (1956). "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf v. USI Film Prods*, 511 U.S. 244, 269-70, (1994). The Act clearly attaches new legal consequences to Mrs. Schiavo's previously adjudicated privacy right. Before its enactment Mrs. Schiavo was permitted to exercise, and indeed was exercising, her right to the privacy of her own medical treatment decisions. Following the passage of the Act, the Governor issued an Executive Order that completely deprived her of the ability to exercise that right.

In determining whether this Act may be applied retroactively, this court must determine: (1) whether there is clear evidence of legislative intent to apply the law retroactively; and (2) whether retroactive application is constitutionally permissible, in that the new law does not create new obligations, impose new penalties, or impair vested rights. *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So.2d 494, 499 (Fla. 1999).

The first question in this analysis addresses legislative intent. As a rule of statutory construction, there is a presumption that a statute will only operate prospectively, unless there is a clear expression of legislative intent that it should be applied otherwise. *Campus Communications, Inc., v. Earnhardt*, 821 So.2d 388, 395 (Fla. 5th DCA 2002). In this case, there is no clear expression of legislative intent that the statute should operate to retroactively overturn a previously-entered final judgment specifically ordering the discontinuance of life-prolonging procedures. Accordingly, the Act facially appears to have only prospective application and the Governor's executive order, admittedly reversing the guardianship court's previously entered final judgment regarding the removal of the nutrition/hydration tube, would not be specifically authorized by the Act's own terms. However, the issue of whether or not this Act was intended to have retrospective application is not one that this court is required to resolve in order to determine the constitutionality of the Governor's actions pursuant to its terms. Even if the Act exhibits a specific intent that it be applied retroactively, the executive order entered pursuant to it is still unconstitutional by virtue of the second prong of the analysis.

That second prong focuses on the destruction of existing rights. The law has long disfavored retroactive legislation that destroys existing vested rights.

> As Justice SCALIA has demonstrated, the presumption against retroactive legislation is deeply rooted in our

> jurisprudence, and embodies a legal doctrine centuries older than our Republic. (Citation Note Omitted) Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. *Landgraf*, 511 U.S. at 265.

Justice Stevens went on to describe the various provisions of the Constitution that demonstrate this "antiretroactivity" principle, including the *Ex Post Facto* clause, the prohibition against Bills of Attainder, and the Due Process Clause, and stated:

> These provisions demonstrate that retroactive statutes raise particular concerns. The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a merles of retribution against unpopular groups or individuals. *Id.* at 266.

"Groups targeted by retroactive laws, were they to be denied all [due process] protection, would have a justified fear that a government once formed to protect expectations now can destroy them." *Eastern Enterprises v. Apfel*, 524 U.S. 498 at 549 (1998).

Similarly, Florida courts have acknowledged that the retroactive abolition of substantive vested rights is prohibited by constitutional due process considerations. Metro. Dade County, 737 So.2d at 503; *R.A.M. of South Florida, Inc. v. WCI Communities Inc.*, 2004 WL 591476 (Fla. 2d DCA March 26, 2004).

However, the prohibition against the retroactive destruction of existing rights is not absolute. The determination of the retroactive propriety of a legislative act requires a weighing

process involving three considerations: the strength of the public interest served by the statute, the extent to which the right affected is abrogated, and the nature of the right affected. *Department of Transportation v. Knowles*, 402 So.2d 1155 (Fla. 1981) (Citing Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv.L.Rev. 692 (1960).). Viewed in the light of these factors, the Act is unquestionably unconstitutional. There is no public interest served by authorizing the Governor to have the unbridled power to overrule a final judgment determining and declaring the constitutional privacy rights of a Florida citizen. The deprivation of Mrs. Schiavo's privacy right authorized by the Act is total, and bereft of all due process protections. Finally, the privacy right involved is so significant that it is constitutionally guaranteed. The deprivation of vested rights is particularly manifest when the rights being deprived have resulted from a court's issuance of a final judgment specifically acknowledging those rights and ordering conduct consistent with those rights. *Department of Transportation v. Knowles*, supra.

It is difficult to imagine a clearer deprivation of a judicially vested right by retroactive legislation than that which has occurred in this case. The guardianship court issued its final judgment after six plus years of litigation. The guardianship proceeding provided the parties with the full panoply of due process rights, including the extensively exercised right of appellate review. The guardianship court's final judgment established for Mrs. Schiavo a vested right to discontinue further life-prolonging procedures. The subject legislation cannot retroactively create in the Governor some previously nonexistent legal interest in controlling Mrs. Schiavo's private medical decisions after those decisions have been finally adjudicated and her rights thereto vested.

As noted in the discussion of the separation-of-powers infirmity, this court is not relying upon *res judicata* or

collateral estoppel to establish facts from the prior guardianship litigation. Those facts have no relevance to the legal issue here being addressed. The only relevant fact regarding the guardianship action that is significant to the constitutional retroactivity analysis of this challenged legislation is the existence of the final judgment itself. That final judgment has been stipulated into evidence by the parties, and the rights it confers are a matter of law.

Because it is a type of retroactive legislation that is not constitutionally prohibited, it is important to briefly distinguish the concept of *remedial legislation* from the circumstances in this case. Remedial legislation is, by its very nature, retroactive in effect. It is legislation that operates in furtherance of a remedy or confirms rights already in existence: However, it may not deprive one of vested rights. *City of Lakeland v. Catinella*, 129 So.2d 133 (FL: 1961). "Remedial statutes simply confer or change a remedy in furtherance of existing rights and do not deny a claimant his or her vested rights." *Rustic Lodge v. Escobar*, 729 So.2d 1014 (Fla. 1" DCA 1999). As indicated above, Mrs. Schiavo is being deprived of significant vested rights by virtue of the application of this legislation to her. Chapter 2003-418 is not remedial.

As it has been applied to Mrs. Schiavo, the Act constitutes unconstitutionally retroactive legislation.

III.

Remaining Constitutional Issues

Because the Court finds that the actions of the Legislature and the Governor violated Mrs. Schiavo's right to privacy, due process, and the separation-of-powers doctrine; it is unnecessary to address the other constitutional issues raised by Petitioner's action. Those issues include the assertion that

the Act constitutes an unlawful Bill of Attainder, is an unlawfully enacted special law, and is unconstitutionally vague. If, upon review, it is ultimately determined that chapter 2003-418 and the Executive Order promulgated under it do not violate those constitutional prohibitions, then some additional factual determinations may be required. At this point, however, there is sufficient undisputed record evidence through stipulation and judicial notice to find that there is no genuine issue of material fact as to those constitutional issues addressed herein, and that the Petitioner is entitled to a final summary judgment regarding those constitutional issues as a matter of law. However, by not discussing those other issues, the court is not foreclosing the possibility that there may be additional constitutional infirmities. Therefore, it is

ORDERED AND ADJUDGED that the Petitioner's Motion for Summary Judgment be, and the same is hereby GRANTED and Summary Final Judgment is entered in favor of the Petitioner, and it is

FURTHER ORDERED AND ADJUDGED that Ch. 2003-418, Laws of Fla., is determined and herewith declared to be unconstitutional for the reasons herein expressed, and it is

FURTHER ORDERED AND ADJUDGED that Executive Order No. 03-201, be and the same is hereby declared to be void and of no further legal affect.

FURTHER ORDERED that the Respondent, Jeb Bush, Governor of the State of Florida, be and he is hereby enjoined and restrained from exercising any authority or ordering any conduct pursuant to the provisions of Ch. 2003-418, Laws of Fla.

DONE AND ORDERED in chambers at Clearwater, Pinellas County, Florida this ____ day of May, 2004.

_____

W. DOUGLAS BAIRD, CIRCUIT JUDGE

Copies Furnished To:

George J. Felos, Esq.
Kenneth L. Connor, Esq.
Thomas J. Perrelli, Esq.
Robert M. Portman, Esq.
Nicole G. Berner, Esq.
Randall C. Marshall, Esq.
David A. Cortman, Esq.
Jay Vail, Esq.

APPENDIX B

SUPREME COURT OF FLORIDA

No. SC04-925

JEB BUSH, Governor of Florida, *et al.*,
Appellants,

v.

MICHAEL SCHIAVO, Guardian of Theresa Schiavo,
Appellee.

Sept. 23, 2004

PARIENTE, *C.J.*

The narrow issue in this case requires this Court to decide the constitutionality of a law passed by the Legislature that directly affected Theresa Schiavo, who has been in a persistent vegetative state since 1990.[1] This Court, after careful consideration of the arguments of the parties and amici, the constitutional issues raised, the precise wording of the challenged law, and the underlying procedural history of this case, concludes that the law violates the fundamental constitutional tenet of separation of powers and is therefore unconstitutional both on its face and as applied to Theresa Schiavo. Accordingly, we affirm the trial court's order declaring the law unconstitutional.

[1] The trial court, in an extensive written order, declared that the law was unconstitutional as a violation of separation of powers, as a violation of the right of privacy and as unconstitutional retroactive legislation. The Second District Court of Appeal certified this case as one of great public importance and requiring immediate resolution by this Court. We have jurisdiction. *See* art. V, § 3(b)(5), Fla. Const.

FACTS AND PROCEDURAL HISTORY

The resolution of the discrete separation of powers issue presented in this case does not turn on the facts of the underlying guardianship proceedings that resulted in the removal of Theresa's nutrition and hydration tube. The underlying litigation, which has pitted Theresa's husband, Michael Schiavo, against Theresa's parents, turned on whether the procedures sustaining Theresa's life should be discontinued. However, the procedural history is important because it provides the backdrop to the Legislature's enactment of the challenged law. We also detail the facts and procedural history in light of the Governor's assertion that chapter 2003-418, Laws of Florida (hereinafter sometimes referred to as "the Act"), was passed in order to protect the due process rights of Theresa and other individuals in her position.

As set forth in the Second District's first opinion in this case, which upheld the guardianship court's final order,

> Theresa Marie Schindler was born on December 3, 1963, and lived with or near her parents in Pennsylvania until she married Michael Schiavo on November 10, 1984. Michael and Theresa moved to Florida in 1986. They were happily married and both were employed. They had no children.
>
> On February 25, 1990, their lives changed. Theresa, age 27, suffered a cardiac arrest as a result of a potassium imbalance. Michael called 911, and Theresa was rushed to the hospital. She never regained consciousness.
>
> Since 1990, Theresa has lived in nursing homes with constant care. She is fed and hydrated by tubes. The staff changes her diapers regularly. She has had numerous health problems, but none have been life threatening.

In re Guardianship of Schiavo, 780 So.2d 176, 177 (Fla. 2d DCA 2001) (*Schiavo I*).

For the first three years after this tragedy, Michael and Theresa's parents, Robert and Mary Schindler, enjoyed an amicable relationship. However, that relationship ended in 1993 and the parties literally stopped speaking to each other. In May of 1998, eight years after Theresa lost consciousness, Michael petitioned the guardianship court to authorize the termination of life-prolonging procedures. *See id.* By filing this petition, which the Schindlers opposed, Michael placed the difficult decision in the hands of the court.

After a trial, at which both Michael and the Schindlers presented evidence, the guardianship court issued an extensive written order authorizing the discontinuance of artificial life support. The trial court found by clear and convincing evidence that Theresa Schiavo was in a persistent vegetative state and that Theresa would elect to cease life-prolonging procedures if she were competent to make her own decision. This order was affirmed on direct appeal, *see Schiavo I,* 780 So.2d at 177, and we denied review. *See In re Guardianship of Schiavo,* 789 So.2d 348 (Fla.2001).

The severity of Theresa's medical condition was explained by the Second District as follows:

> The evidence is overwhelming that Theresa is in a permanent or persistent vegetative state. It is important to understand that a persistent vegetative state is not simply a coma. She is not asleep. She has cycles of apparent wakefulness and apparent sleep without any cognition or awareness. As she breathes, she often makes moaning sounds. Theresa has severe contractures of her hands, elbows, knees, and feet.
>
> Over the span of this last decade, Theresa's brain has deteriorated because of the lack of oxygen it suffered at the time of the heart attack. By mid 1996, the CAT scans of her brain showed a severely abnormal structure. At this point, much of her cerebral cortex is simply gone

> and has been replaced by cerebral spinal fluid. Medicine cannot cure this condition. Unless an act of God, a true miracle, were to recreate her brain, Theresa will always remain in an unconscious, reflexive state, totally dependent upon others to feed her and care for her most private needs. She could remain in this state for many years.

Schiavo I, 780 So.2d at 177. In affirming the trial court's order, the Second District concluded by stating:

> In the final analysis, the difficult question that faced the trial court was whether Theresa Marie Schindler Schiavo, not after a few weeks in a coma, but after ten years in a persistent vegetative state that has robbed her of most of her cerebrum and all but the most instinctive of neurological functions, with no hope of a medical cure but with sufficient money and strength of body to live indefinitely, would choose to continue the constant nursing care and the supporting tubes in hopes that a miracle would somehow recreate her missing brain tissue, or whether she would wish to permit a natural death process to take its course and for her family members and loved ones to be free to continue their lives. After due consideration, we conclude that the trial judge had clear and convincing evidence to answer this question as he did.

Schiavo I, 780 So.2d at 180.

Although the guardianship court's final order authorizing the termination of life-prolonging procedures was affirmed on direct appeal, the litigation continued because the Schindlers began an attack on the final order. The Schindlers filed a motion for relief from judgment under *Florida Rule of Civil Procedure* 1.540(b)(2) and (3) in the guardianship court, alleging newly discovered evidence and intrinsic fraud. The Schindlers also filed a separate complaint in the civil division

of the circuit court, challenging the final judgment of the guardianship court. *See In re Guardianship of Schiavo,* 792 So.2d 551, 555-56 (Fla. 2d DCA 2001) (*Schiavo II*).

The trial court determined that the post-judgment motion was untimely and the Schindlers appealed. The Second District agreed that the guardianship court had appropriately denied the rule 1.540(b)(2) and (3) motion as untimely. *See Schiavo II,* 792 So.2d at 558. The Second District also reversed an injunction entered in the case pending before the civil division of the circuit court. *See id.* at 562. However, the Second District determined that the Schindlers, as "interested parties," had standing to file either a motion for relief from judgment under Florida Rule of Civil Procedure 1.540(b)(5) or an independent action in the guardianship court to challenge the judgment on the ground that it is "no longer equitable for the trial court to enforce its earlier order." *Schiavo II,* 792 So.2d at 560 (quotation marks omitted). Nonetheless, the Second District pointedly cautioned

> that any proceeding to challenge a final order on this basis is extraordinary and should not be filed merely to delay an order with which an interested party disagrees or to retry an adversary proceeding. The interested party must establish that new circumstances make it no longer equitable to enforce the earlier order. In this case, if the Schindlers believe a valid basis for relief from the order exists, they must plead and prove newly discovered evidence of such a substantial nature that it proves either (1) that Mrs. Schiavo would not have made the decision to withdraw life-prolonging procedures fourteen months earlier when the final order was entered, or (2) that Mrs. Schiavo would make a different decision at this time based on developments subsequent to the earlier court order.

Id. at 554.

On remand, the Schindlers filed a timely motion for relief from judgment pursuant to rule 1.540(b)(5). *See In re Guardianship of Schiavo,* 800 So.2d 640, 642 (Fla. 2d DCA 2001) (*Schiavo III*). The trial court summarily denied the motion but the Second District reversed and remanded to the guardianship court for the purpose of conducting a limited evidentiary hearing:

> Of the four issues resolved in the original trial . . . , we conclude that the motion establishes a colorable entitlement only as to the fourth issue. As to that issue—whether there was clear and convincing evidence to support the determination that Mrs. Schiavo would choose to withdraw the life-prolonging procedures—the motion for relief from judgment alleges evidence of a new treatment that could dramatically improve Mrs. Schiavo's condition and allow her to have cognitive function to the level of speech. In our last opinion we stated that the Schindlers had "presented no medical evidence suggesting that any new treatment could restore to Mrs. Schiavo a level of function within the cerebral cortex that would allow her to understand her perceptions of sight and sound or to communicate or respond cognitively to those perceptions." *Schiavo II,* 792 So.2d at 560. Although we have expressed some lay skepticism about the new affidavits, the Schindlers now have presented some evidence, in the form of the affidavit of Dr. [Fred] Webber, of such a potential new treatment.

Id. at 645.

The Second District permitted the Schindlers to present evidence to establish by a preponderance of the evidence that the judgment was no longer equitable and specifically held:

> To meet this burden, they must establish that new treatment offers sufficient promise of increased cognitive

> function in Mrs. Schiavo's cerebral cortex—significantly improving the quality of Mrs. Schiavo's life—so that she herself would elect to undergo this treatment and would reverse the prior decision to withdraw life-prolonging procedures.

Id. The Second District required an additional set of medical examinations of Theresa and instructed that one of the physicians must be a new, independent physician selected either by the agreement of the parties or, if they could not agree, by the appointment of the guardianship court. *See id.* at 646.

After conducting a hearing for the purpose set forth in the Second District's decision, the guardianship court denied the Schindlers' motion for relief from judgment. *See In re Guardianship of Schiavo,* 851 So.2d 182, 183 (Fla. 2d DCA 2003) (*Schiavo IV*). In reviewing the trial court's order, the Second District explained that it was "not reviewing a final judgment in this appellate proceeding. The final judgment was entered several years ago and has already been affirmed by this court." *Id.* at 185-86. However, the Second District carefully examined the record:

> Despite our decision that the appropriate standard of review is abuse of discretion, this court has closely examined all of the evidence in this record. We have repeatedly examined the videotapes, not merely watching short segments but carefully observing the tapes in their entirety. We have examined the brain scans with the eyes of educated laypersons and considered the explanations provided by the doctors in the transcripts. We have concluded that, if we were called upon to review the guardianship court's decision de novo, we would still affirm it.

Id. at 186. Finally, the Second District concluded its fourth opinion in the Schiavo case with the following observation:

> The judges on this panel are called upon to make a collective, objective decision concerning a question of law. Each of us, however, has our own family, our own loved ones, our own children. From our review of the videotapes of Mrs. Schiavo, despite the irrefutable evidence that her cerebral cortex has sustained the most severe of irreparable injuries, we understand why a parent who had raised and nurtured a child from conception would hold out hope that some level of cognitive function remained. If Mrs. Schiavo were our own daughter, we could not but hold to such a faith.
>
> But in the end, this case is not about the aspirations that loving parents have for their children. It is about Theresa Schiavo's right to make her own decision, independent of her parents and independent of her husband.... It may be unfortunate that when families cannot agree, the best forum we can offer for this private, personal decision is a public courtroom and the best decision-maker we can provide is a judge with no prior knowledge of the ward, but the law currently provides no better solution that adequately protects the interests of promoting the value of life. We have previously affirmed the guardianship court's decision in this regard, and we now affirm the denial of a motion for relief from that judgment.

Id. at 186-87. We denied review, *see In re Guardianship of Schiavo,* 855 So.2d 621 (Fla.2003), and Theresa's nutrition and hydration tube was removed on October 15, 2003.

On October 21, 2003, the Legislature enacted chapter 2003-418, the Governor signed the Act into law, and the Governor issued executive order No. 03-201 to stay the continued withholding of nutrition and hydration from Theresa. The nutrition and hydration tube was reinserted pursuant to the Governor's executive order.

On the same day, Michael Schiavo brought the action for declaratory judgment in the circuit court. Relying on undis-

puted facts and legal argument, the circuit court entered a final summary judgment on May 6, 2004, in favor of Michael Schiavo, finding the Act unconstitutional both on its face and as applied to Theresa. Specifically, the circuit court found that chapter 2003- 418 was unconstitutional on its face as an unlawful delegation of legislative authority and as a violation of the right to privacy, and unconstitutional as applied because it allowed the Governor to encroach upon the judicial power and to retroactively abolish Theresa's vested right to privacy.[2]

ANALYSIS

We begin our discussion by emphasizing that our task in this case is to review the constitutionality of chapter 2003-418, not to reexamine the guardianship court's orders directing the removal of Theresa's nutrition and hydration tube, or to review the Second District's numerous decisions in the guardianship case. Although we recognize that the parties continue to dispute the findings made in the prior proceedings, these proceedings are relevant to our decision only to the extent that they occurred and resulted in a final judgment directing the withdrawal of life-prolonging procedures.[3]

The language of chapter 2003-418 is clear. It states in full:

> Section 1. (1) The Governor shall have the authority to issue a one-time stay to prevent the withholding of nutrition and hydration from a patient if, as of October 15, 2003:
>
> (a) That patient has no written advance directive;

---

[2] Because we find the separation of powers issue to be dispositive in this case, we do not reach the other constitutional issues addressed by the circuit court.

[3] The parties stipulated that the circuit court was authorized to take judicial notice of three orders of the guardianship court. The circuit court relied only on the existence of these orders in finding chapter 2003-418 unconstitutional as applied.

(b) The court has found that patient to be in a persistent vegetative state;

(c) That patient has had nutrition and hydration withheld; and

(d) A member of that patient's family has challenged the withholding of nutrition and hydration.

(2) The Governor's authority to issue the stay expires 15 days after the effective date of this act, and the expiration of the authority does not impact the validity or the effect of any stay issued pursuant to this act. The Governor may lift the stay authorized under this act at any time. A person may not be held civilly liable and is not subject to regulatory or disciplinary sanctions for taking any action to comply with a stay issued by the Governor pursuant to this act.

(3) Upon issuance of a stay, the chief judge of the circuit court shall appoint a guardian ad litem for the patient to make recommendations to the Governor and the court.

Section 2. This act shall take effect upon becoming a law.

Ch.2003-418, Laws of Fla. Thus, chapter 2003-418 allowed the Governor to issue a stay to prevent the withholding of nutrition and hydration from a patient under the circumstances provided for in subsections (1)(a)-(d). Under the fifteen-day sunset provision, the Governor's authority to issue the stay expired on November 5, 2003. *See id.* The Governor's authority to lift the stay continues indefinitely.

SEPARATION OF POWERS

The cornerstone of American democracy known as separation of powers recognizes three separate branches of government—the executive, the legislative, and the judicial—each with its own powers and responsibilities. In Florida, the

constitutional doctrine has been expressly codified in article II, section 3 of the Florida Constitution, which not only divides state government into three branches but also expressly prohibits one branch from exercising the powers of the other two branches:

> Branches of Government.--The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

"This Court . . . has traditionally applied a strict separation of powers doctrine," *State v. Cotton,* 769 So.2d 345, 353 (Fla.2000), and has explained that this doctrine "encompasses two fundamental prohibitions. The first is that no branch may encroach upon the powers of another. The second is that no branch may delegate to another branch its constitutionally assigned power." *Chiles v. Children A, B, C, D, E, & F,* 589 So.2d 260, 264 (Fla.1991) (citation omitted).

The circuit court found that chapter 2003-418 violates both of these prohibitions, and we address each separately below. Our standard of review is de novo. *See Major League Baseball v. Morsani,* 790 So.2d 1071, 1074 (Fla.2001) (stating that a trial court's ruling on a motion for summary judgment posing a pure question of law is subject to de novo review).

Encroachment on the Judicial Branch

We begin by addressing the argument that, as applied to Theresa Schiavo, the Act encroaches on the power and authority of the judicial branch. More than 140 years ago this Court explained the foundation of Florida's express separation of powers provision:

> The framers of the Constitution of Florida, doubtless, had in mind the omnipotent power often exercised by the

> British Parliament, the exercise of judicial power by the Legislature in those States where there are no written Constitutions restraining them, when they wisely prohibited the exercise of such powers in our State.
>
> That Convention was composed of men of the best legal minds in the country—men of experience and skilled in the law—who had witnessed the breaking down by unrestrained legislation all the security of property derived from contract, the divesting of vested rights by doing away the force of the law as decided, the over-turning of solemn decisions of the Courts of the last resort, by, under the pretence of remedial acts, enacting for one or the other party litigants such provisions as would dictate to the judiciary their decision, and leaving everything which should be expounded by the judiciary to the variable and ever-changing mind of the popular branch of the Government.

Trustees Internal Improvement Fund v. Bailey, 10 Fla. 238, 250 (1863). Similarly, the framers of the United States Constitution recognized the need to establish a judiciary independent of the legislative branch. Indeed, the desire to prevent Congress from using its power to interfere with the judgments of the courts was one of the primary motivations for the separation of powers established at this nation's founding:

> This sense of a sharp necessity to separate the legislative from the judicial power, prompted by the crescendo of legislative interference with private judgments of the courts, triumphed among the Framers of the new Federal Constitution. The Convention made the critical decision to establish a judicial department independent of the Legislative Branch. . . . Before and during the debates on ratification, Madison, Jefferson, and Hamilton each wrote of the factional disorders and disarray that the system of legislative equity had produced in the years

> before the framing; and each thought that the separation of the legislative from the judicial power in the new Constitution would cure them. Madison's Federalist No. 48, the famous description of the process by which "[t]he legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex," referred to the report of the Pennsylvania Council of Censors to show that in that State "cases belonging to the judiciary department [had been] frequently drawn within legislative cognizance and determination." Madison relied as well on Jefferson's Notes on the State of Virginia, which mentioned, as one example of the dangerous concentration of governmental powers into the hands of the legislature, that "the Legislature ... in many instances decided rights which should have been left to judiciary controversy."

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 221-22, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995) (citations omitted).

Under the express separation of powers provision in our state constitution, "the judiciary is a coequal branch of the Florida government vested with the sole authority to exercise the judicial power," and "the legislature cannot, short of constitutional amendment, reallocate the balance of power expressly delineated in the constitution among the three coequal branches." *Children A, B, C, D, E, & F,* 589 So.2d at 268-69; *see also Office of State Attorney v. Parrotino,* 628 So.2d 1097, 1099 (Fla.1993) ("[T]he legislature cannot take actions that would undermine the independence of Florida's judicial . . . offices.").

As the United States Supreme Court has explained, the power of the judiciary is "not merely to rule on cases, but to *decide* them, subject to review only by superior courts" and "[h]aving achieved finality . . . a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy." *Plaut,* 514 U.S. at 218-19,

227, 115 S.Ct. 1447. Moreover, "purely judicial acts . . . are not subject to review as to their accuracy by the Governor." *In re Advisory Opinion to the Governor,* 213 So.2d 716, 720 (Fla.1968); *see also Children A, B, C, D, E, & F,* 589 So.2d at 269 ("The judicial branch cannot be subject in any manner to oversight by the executive branch.").

In *Advisory Opinion,* the Governor asked the Court whether he had the "constitutional authority to review the judicial accuracy and propriety of [a judge] and to suspend him from office if it does not appear ... that the Judge has exercised proper judicial discretion and wisdom." 213 So.2d at 718. The Court agreed that the Governor had the authority to suspend a judge on the grounds of incompetency "if the physical or mental incompetency is established and determined within the Judicial Branch by a court of competent jurisdiction." *Id.* at 720. However, the Court held that the Governor did not have the power to "review the judicial discretion and wisdom of a ... Judge while he is engaged in the judicial process." *Id.* The Court explained that article V of the Florida Constitution provides for appellate review for the benefit of litigants aggrieved by the decisions of the lower court, and that "[a]ppeal is the exclusive remedy." *Id.*

In this case, the undisputed facts show that the guardianship court authorized Michael to proceed with the discontinuance of Theresa's life support after the issue was fully litigated in a proceeding in which the Schindlers were afforded the opportunity to present evidence on all issues. This order as well as the order denying the Schindlers' motion for relief from judgment were affirmed on direct appeal. *See Schiavo I,* 780 So.2d at 177; *Schiavo IV,* 851 So.2d at 183. The Schindlers sought review in this Court, which was denied. Thereafter, the tube was removed. Subsequently, pursuant to the Governor's executive order, the nutrition and hydration tube was reinserted. Thus, the Act, as applied in this case, resulted in an executive order that

effectively reversed a properly rendered final judgment and thereby constituted an unconstitutional encroachment on the power that has been reserved for the independent judiciary. *Cf. Bailey,* 10 Fla. at 249-50 (noting that had the statute under review "directed a rehearing, the hearing of the case would necessarily carry with it the right to set aside the judgment of the Court, and there would be unquestionably an exercise of judicial power").

The Governor and amici assert that the Act does not reverse a final court order because an order to discontinue life-prolonging procedures may be challenged at any time prior to the death of the ward. In advancing this argument, the Governor and amici rely on the Second District's conclusion that as long as the ward is alive, an order discontinuing life-prolonging procedures "is subject to recall and is executory in nature." *Schiavo II,* 792 So.2d at 559. However, the Second District did not hold that the guardianship court's order was not a final judgment but, rather, that the Schindlers, as interested parties, could file a motion for relief from judgment under Florida Rule of Civil Procedure 1.540(b)(5) if they sufficiently alleged that it is no longer equitable that the judgment have prospective application. *See id.* at 561. Rule 1.540(b) expressly states that a motion filed pursuant to its terms "does not affect the finality of a judgment." Further, the fact that a final judgment may be subject to recall under a rule of procedure, if certain circumstances can be proved, does not negate its finality. Unless and until the judgment is vacated by judicial order, it is "the last word of the judicial department with regard to a particular case or controversy." *Plaut,* 514 U.S. at 227, 115 S.Ct. 1447.

Under procedures enacted by the Legislature, effective both before the passage of the Act and after its fifteen-day effective period expired, circuit courts are charged with adjudicating issues regarding incompetent individuals. The trial courts of this State are called upon to make many of the

most difficult decisions facing society. In proceedings under chapter 765, Florida Statutes (2003), these decisions literally affect the lives or deaths of patients. The trial courts also handle other weighty decisions affecting the welfare of children such as termination of parental rights and child custody. *See* § 61.13(2)(b)(1), Fla. Stat. (2003) ("The court shall determine all matters relating to custody of each minor child of the parties in accordance with the best interests of the child and in accordance with the Uniform Child Custody Jurisdiction and Enforcement Act."); § 39.801(2), Fla. Stat. (2003) ("The circuit court shall have exclusive original jurisdiction of a proceeding involving termination of parental rights."). When the prescribed procedures are followed according to our rules of court and the governing statutes, a final judgment is issued, and all post-judgment procedures are followed, it is without question an invasion of the authority of the judicial branch for the Legislature to pass a law that allows the executive branch to interfere with the final judicial determination in a case. That is precisely what occurred here and for that reason the Act is unconstitutional as applied to Theresa Schiavo.

Delegation of Legislative Authority

In addition to concluding that the Act is unconstitutional as applied in this case because it encroaches on the power of the judicial branch, we further conclude that the Act is unconstitutional on its face because it delegates legislative power to the Governor. The Legislature is permitted to transfer subordinate functions "to permit administration of legislative policy by an agency with the expertise and flexibility to deal with complex and fluid conditions." *Microtel, Inc. v. Fla. Public Serv. Comm'n,* 464 So.2d 1189, 1191 (Fla.1985). However, under article II, section 3 of the constitution the Legislature "may not delegate the power to enact a law or the right to exercise unrestricted discretion in applying the law."

Sims v. State, 754 So.2d 657, 668 (Fla.2000). This prohibition, known as the nondelegation doctrine, requires that "fundamental and primary policy decisions . . . be made by members of the legislature who are elected to perform those tasks, and [that the] administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program." *Askew v. Cross Key Waterways,* 372 So.2d 913, 925 (Fla.1978); *see also Avatar Dev. Corp. v. State,* 723 So.2d 199, 202 (Fla.1998) (citing *Askew* with approval). In other words, statutes granting power to the executive branch "must clearly announce adequate standards to guide . . . in the execution of the powers delegated. The statute must so clearly define the power delegated that the [executive] is precluded from acting through whim, showing favoritism, or exercising unbridled discretion." *Lewis v. Bank of Pasco County,* 346 So.2d 53, 55-56 (Fla. 1976). The requirement that the Legislature provide sufficient guidelines also ensures the availability of meaningful judicial review:

> In the final analysis it is the courts, upon a challenge to the exercise or nonexercise of administrative action, which must determine whether the administrative agency has performed consistently with the mandate of the legislature. When legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of the law.

Askew, 372 So.2d at 918-19.

We have recognized that the "specificity of the guidelines [set forth in the legislation] will depend on the complexity of the subject and the 'degree of difficulty involved in articulating finite standards.'" *Brown v. Apalachee Regional Planning Council,* 560 So.2d 782, 784 (Fla.1990) (quoting *Askew,* 372 So.2d at 918). However, we have also made clear

that "[e]ven where a general approach would be more practical than a detailed scheme of legislation, enactments may not be drafted in terms so general and unrestrictive that administrators are left without standards for the guidance of their official acts." *State Dep't of Citrus v. Griffin,* 239 So.2d 577, 581 (Fla.1970).

In both *Askew* and *Lewis,* this Court held that the respective statutes under review violated the nondelegation doctrine because they failed to provide the executive branch with adequate guidelines and criteria. In *Askew,* the Court invalidated a statute that directed the executive branch to designate certain areas of the state as areas of critical state concern but did not contain sufficient standards to allow "a reviewing court to ascertain whether the priorities recognized by the Administration Commission comport with the intent of the legislature." 372 So.2d at 919. The statute in question enunciated the following criteria for the Division of State Planning to use in identifying a particular area as one of critical state concern:

> (a) An area containing, or having a significant impact upon, environmental, historical, natural, or archaeological resources of regional or statewide importance.
>
> (b) An area significantly affected by, or having a significant effect upon, an existing or proposed major public facility or other area of major public investment.
>
> (c) A proposed area of major development potential, which may include a proposed site of a new community, designated in a state land development plan.

Id. at 914-15 (quoting section 380.05(2), Florida Statutes (1975)). The Court concluded that the criteria for designation of an area of critical concern set forth in subsections (a) and (b) were defective because they gave the executive agency "the fundamental legislative task of determining which geographic areas and resources [were] in greatest need of

protection." *Id.* at 919. With regard to subsection (a), this Court agreed with the district court that the deficiency resulted from the Legislature's failure to "establish or provide for establishing priorities or other means for identifying and choosing among the resources the Act is intended to preserve." *Id.* (quoting *Cross Key Waterways v. Askew,* 351 So.2d 1062, 1069 (Fla. 1st DCA 1977)). Subsection (b) suffered a similar defect by expanding "the choice to include areas which in unstated ways affect or are affected by any 'major public facility' which is defined in Section 380.031(10), or any 'major public investment,' which is not." *Id.*

Lewis involved a statute that gave the state comptroller the unrestricted power to release banking records to the public that were otherwise considered confidential under the Public Records Act. *See* 346 So.2d at 55. The statute at issue provided in pertinent part:

> Division records.
>
> All bank or trust company applications, investigation reports, examination reports, and related information, including any duly authorized copies in possession of any banking organization, foreign banking corporation, or any other person or agency, shall be confidential communications, other than such documents as are required by law to be published, and shall not be made public, unless *with the consent of the department,* pursuant to a court order, or in response to legislative subpoena as provided by law.

Lewis, 346 So.2d at 54 (quoting section 658.10, Florida Statutes (1975)) (alteration in original). This Court held that the law was "couched in vague and uncertain terms or is so broad in scope that . . . it must be held unconstitutional as attempting to grant to the . . . [comptroller] the power to say

what the law shall be." 346 So.2d at 56 (quoting *Sarasota County v. Barg,* 302 So.2d 737, 742 (Fla.1974)) (alterations in original).

In this case, the circuit court found that chapter 2003-418 contains no guidelines or standards that "would serve to limit the Governor from exercising completely unrestricted discretion in applying the law to" those who fall within its terms. The circuit court explained:

> The terms of the Act affirmatively confirm the discretionary power conferred upon the Governor. He is given the "authority to issue a one-time stay to prevent the withholding of nutrition and hydration from a patient" under certain circumstances but, he is not required to do so. Likewise, the act provides that the Governor "*may* lift the stay authorized under this act at any time. The Governor *may* revoke the stay upon a finding that a change in the condition of the patient warrants revocation." (Emphasis added). In both instances there is nothing to provide the Governor with any direction or guidelines for the exercise of this delegated authority. The Act does not suggest what constitutes "a change in condition of the patient" that could "warrant revocation." Even when such an undefined "change" occurs, the Governor is not compelled to act. The Act confers upon the Governor the unfettered discretion to determine what the terms of the Act mean and when, or if, he may act under it.

We agree with this analysis. In enacting chapter 2003-418, the Legislature failed to provide any standards by which the Governor should determine whether, in any given case, a stay should be issued and how long a stay should remain in effect. Further, the Legislature has failed to provide any criteria for lifting the stay. This absolute, unfettered discretion to decide whether to issue and then when to lift a stay makes the Governor's decision virtually unreviewable.

The Governor asserts that by enacting chapter 2003-418 the Legislature determined that he should be permitted to act as proxy for an incompetent patient in very narrow circumstances and, therefore, that his discretion is limited by the provisions of chapter 765. However, the Act does not refer to the provisions of chapter 765. Specifically, the Act does not amend section 765.401(1), Florida Statutes (2003), which sets forth an order of priority for determining who should act as proxy for an incapacitated patient who has no advance directive. Nor does the Act require that the Governor's decision be made in conformity with the requirement of section 765.401 that the proxy's decision be based on "the decision the proxy reasonably believes that patient would have made under the circumstances" or, if there is no indication of what the patient would have chosen, in the patient's best interests. § 765.401(2)-(3), Fla. Stat. (2003). Finally, the Act does not provide for review of the Governor's decision as proxy as required by section 765.105, Florida Statutes (2003). In short, there is no indication in the language of chapter 2003-418 that the Legislature intended the Governor's discretion to be limited in any way. Even if we were to read chapter 2003-418 in pari materia with chapter 765, as the Governor suggests, there is nothing in chapter 765 to guide the Governor's discretion in issuing a stay because chapter 765 does not contemplate that a proxy will have the type of open-ended power delegated to the Governor under the Act.

We also reject the Governor's argument that this legislation provides an additional layer of due process protection to those who are unable to communicate their wishes regarding end-of-life decisions. Parts I, II, III, and IV of chapter 765, enacted by the Legislature in 1992 and amended several times,[4] provide detailed protections for those who are adju-

---

[4] Prior to this Court's decision in *In re Guardianship of Browning*, 568 So.2d 4 (Fla.1990), statutory law provided a procedure by which a

competent adult could provide a declaration instructing his or her physician to withhold or withdraw life-prolonging procedures, or designating another to make the treatment decision. *See* §§ 765.01-765.17, Fla. Stat. (1991). This law had been in effect since 1984. In 1992, the Legislature repealed sections 765.01-765.17, *see* ch. 92-199, § 10 at 1852, Laws of Fla., and enacted Parts I, II, III, and IV of chapter 765. *See id.* §§ 2-5. The Legislature provided that in the absence of an advance directive, a proxy may make health care decisions for an incapacitated patient. *See* ch. 92-199, § 5 at 1850 Laws of Fla.; § 765.401 Fla. Stat. (2003). "Health care decisions" include "[i]nformed consent, refusal of consent, or withdrawal of consent to any and all health care, including life-prolonging procedures." Ch. 92-199, § 2 at 1840, Laws of Fla.; § 765.101(5)(a) Fla. Stat. (2003). When the statute was enacted in 1992, the Legislature defined life-prolonging procedures as:

> any medical procedure, treatment, or intervention which:
>
> (a) Utilizes mechanical or other artificial means to sustain, restore, or supplant a spontaneous vital function; and
>
> (b) When applied to a patient in a terminal condition, serves only to prolong the process of dying.

Ch. 92-199, § 2 at 1840-41. However, in 1999, the Legislature rewrote the definitions section and defined life-prolonging procedures as:

> any medical procedure, treatment, or intervention, including artificially provided sustenance and hydration, which sustains, restores, or supplants a spontaneous vital function. The term does not include the administration of medication or performance of medical procedure, when such medication or procedure is deemed necessary to provide comfort care or to alleviate pain.

Ch. 99-331, § 16 at 3464, Laws of Fla.; § 765.101(10), Fla. Stat. (2003).

In order to determine who is to act as a patient's proxy, the Legislature set forth a detailed order of priority. *See* ch. 92-199, § 5 at 1851. This order of priority has been amended only once since 1992 to allow a clinical social worker to act as the patient's proxy if none of the other potential proxies are available. *See* ch.2003-57, § 5, Laws of Fla. The Legislature also provided that a "proxy's decision to withhold or withdraw life-prolonging procedures must by supported by clear and convincing evidence that the decision would have been the one the patient would have chosen had [the patient] been competent." Ch. 92-199, § 5 at 1851, Laws of Fla.; *see also* § 765.401(3), Fla. Stat. (2003).

dicated incompetent, including that the proxy's decision be based on what the patient would have chosen under the circumstances or is in the patient's best interest, and be supported by competent, substantial evidence. *See* § 765.401(2)-(3). Chapter 765 also provides for judicial review if "[t]he patient's family, the health care facility, or the attending physician, or any other interested person who may reasonably be expected to be directly affected by the surrogate or proxy's decision . . . believes [that] [t]he surrogate or proxy's decision is not in accord with the patient's known desires or the provisions of this chapter." § 765.105(1), Fla. Stat. (2003).

In contrast to the protections set forth in chapter 765, chapter 2003-418's standardless, open-ended delegation of authority by the Legislature to the Governor provides no guarantee that the incompetent patient's right to withdraw life-prolonging procedures will in fact be honored. *See In re Guardianship of Browning,* 568 So.2d 4, 12 (Fla.1990) (reaffirming that an incompetent person has the same right to refuse medical treatment as a competent person). As noted above, the Act does not even require that the Governor consider the patient's wishes in deciding whether to issue a stay, and instead allows a unilateral decision by the Governor to stay the withholding of life-prolonging procedures without affording any procedural process to the patient.

Finally, we reject the Governor's argument that the Legislature's grant of authority to issue the stay under chapter 2003-418 is a valid exercise of the state's parens patriae

---

Finally, the Legislature provided for judicial review of a proxy's decision if "[t]he patient's family, the health care facility, or the attending physician, or any other interested person who may reasonably be expected to be directly affected by the surrogate or proxy's decision . . . believes (1) The surrogate or proxy's decision is not in accord with the patient's known desires or the provisions of this chapter." Ch. 92-199, § 2 at 1842, Laws of Fla.; § 765.105, Fla. Stat. (2003).

power. Although unquestionably the Legislature may enact laws to protect those citizens who are incapable of protecting their own interests, *see, e.g., In re Byrne,* 402 So.2d 383 (Fla.1981), such laws must comply with the constitution. Chapter 2003-418 fails to do so.

Moreover, the argument that the Act broadly protects those who cannot protect themselves is belied by the case-specific criteria under which the Governor can exercise his discretion. The Act applies only if a court has found the individual to be in a persistent vegetative state and food and hydration have been ordered withdrawn. It does not authorize the Governor to intervene if a person in a persistent vegetative state is dependent upon another form of life support. Nor does the Act apply to a person who is not in a persistent vegetative state but a court finds, contrary to the wishes of another family member, that life support should be withdrawn. In theory, the Act could have applied during its fifteen-day window to more than one person, but it is undeniable that in fact the criteria fit only Theresa Schiavo.

In sum, although chapter 2003-418 applies to a limited class of people, it provides no criteria to guide the Governor's decision about whether to act. In addition, once the Governor has issued a stay as provided for in the Act, there are no criteria for the Governor to evaluate in deciding whether to lift the stay. Thus, chapter 2003-418 allows the Governor to act "through whim, show [ ] favoritism, or exercis[e] unbridled discretion," *Lewis,* 346 So.2d at 56, and is therefore an unconstitutional delegation of legislative authority.

CONCLUSION

We recognize that the tragic circumstances underlying this case make it difficult to put emotions aside and focus solely on the legal issue presented. We are not insensitive to the struggle that all members of Theresa's family have endured since she fell unconscious in 1990. However, we are a nation

of laws and we must govern our decisions by the rule of law and not by our own emotions. Our hearts can fully comprehend the grief so fully demonstrated by Theresa's family members on this record. But our hearts are not the law. What is in the Constitution always must prevail over emotion. Our oaths as judges require that this principle is our polestar, and it alone.

As the Second District noted in one of the multiple appeals in this case, we "are called upon to make a collective, objective decision concerning a question of law. Each of us, however, has our own family, our own loved ones, our own children.. . . But in the end, this case is not about the aspirations that loving parents have for their children." *Schiavo IV,* 851 So.2d at 186. Rather, as our decision today makes clear, this case is about maintaining the integrity of a constitutional system of government with three independent and coequal branches, none of which can either encroach upon the powers of another branch or improperly delegate its own responsibilities.

The continuing vitality of our system of separation of powers precludes the other two branches from nullifying the judicial branch's final orders. If the Legislature with the assent of the Governor can do what was attempted here, the judicial branch would be subordinated to the final directive of the other branches. Also subordinated would be the rights of individuals, including the well established privacy right to self determination. *See Browning,* 568 So.2d at 11-13. No court judgment could ever be considered truly final and no constitutional right truly secure, because the precedent of this case would hold to the contrary. Vested rights could be stripped away based on popular clamor. The essential core of what the Founding Fathers sought to change from their experience with English rule would be lost, especially their belief that our courts exist precisely to preserve the rights of individuals, even when doing so is contrary to popular will.

The trial court's decision regarding Theresa Schiavo was made in accordance with the procedures and protections set forth by the judicial branch and in accordance with the statutes passed by the Legislature in effect at that time. That decision is final and the Legislature's attempt to alter that final adjudication is unconstitutional as applied to Theresa Schiavo. Further, even if there had been no final judgment in this case, the Legislature provided the Governor constitutionally inadequate standards for the application of the legislative authority delegated in chapter 2003-418. Because chapter 2003-418 runs afoul of article II, section 3 of the Florida Constitution in both respects, we affirm the circuit court's final summary judgment.

It is so ordered.

WELLS, ANSTEAD, LEWIS, QUINCE, CANTERO and BELL, JJ., concur.

APPENDIX C

SUPREME COURT OF FLORIDA

[October 21, 2004]

Case No.: SCO4-925
Lower Tribunal Nos.: 2D04-2045;
03-82 12-CI-20

JEB BUSH, GOVERNOR OF FLORIDA, *ET AL.*
Appellant

vs.

MICHAEL SCHIAVO Guardian: THERESA SCHIAVO
Appellee

Appellant's Amended Motion for Rehearing and Clarification filed with this Court on October 5, 2004, is hereby denied.

The Clerk of the Court is directed to issue the mandate immediately.

PARIENTE, C.J., and WELLS, ANSTEAD, LEWIS, QUINCE, CANTERO and BELL, JJ., concur.

Appellant's Motion for Leave to File Second Amended Motion for Rehearing and Clarification is hereby denied and Appellant's Second Amended Motion for Rehearing and Clarification, and response thereto, are hereby stricken.

PARIENTE, C.J., and LEWIS, CANTERO and BELL, JJ., concur. WELLS, ANSTEAD and QUINCE, JJ., dissent.

A True Copy
Test:

/s/ Thomas D. Hall
THOMAS D. HALL
Clerk, Supreme Court [SEAL]

mc
Served:

CHRISTA E. CALAMAS
DONALD JAY RUBOTTOM
ROBERT A. DESTRO
KENNETH LUKE CONNOR
GEORGE S. LEMIEUX
JASON VAIL
ROBERT M. PORTMAN
GEORGE J. FELOS
RANDALL C. MARSHALL
THOMAS J. PERRELLI
JAY A. SEKULOW
WALTER M. WEBER
PATRICIA FIELDS ANDERSON
NICOLE G. BERNER
HON. W. DOUGLAS BAIRD, JUDGE
BRUCE G. HOWIE
GEORGE K. RAHDERT
HON. JAMES BIRKHOLD, CLERK
HON. KARLEEN F. DEBLAKER, CLERK
DAVID A. CORTMAN
BARBARA J. WELLER
SCOTT MICHAEL SOLKOFF
DAVID CHARLES GIBBS, III
WILLIAM J. SAUNDERS, JR., DIRECTOR
JAN G. HALISKY
MAX LAPERTOSA
ANNE SWERLICK

JON B. IEISENBERG
RUSSELL E. CARLISLE
DAVID S. ETTINGER
EDWIN M. BOYER
LAUCHLIN T. WALDOCH
JAMES M. HENDERSON
MARY LALLEY WAKEMAN
CAMILLE GODWIN

APPENDIX D

CHAPTER 2003-418
House Bill No. 35-E

An act relating to the authority for the Governor to issue a one-time stay; authorizing the Governor to issue a one-time stay to prevent the withholding of nutrition and hydration under certain circumstances; providing for expiration of the stay; authorizing the Governor to lift the stay at any time; providing that a person is not civilly liable and is not subject to regulatory or disciplinary sanctions for taking an action in compliance with any such stay; providing for the chief judge of the circuit court to appoint a guardian ad litem; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. (1) The Governor shall have the authority to issue a one-time stay to prevent the, withholding of nutrition and hydration from a patient if, as of October 15. 2003:

(a) That patient has no written advance directive;

(b) The court has found that patient to be in a persistent vegetative state;

(c) That patient has had nutrition and hydration withheld: and

(d) A member of that patient's family has challenged the withholding of nutrition and hydration.

(2) The Governor's authority to issue the stay expires 15 days after the effective date of this act, and the expiration of that authority does not impact the validity or the effect of any stay issued pursuant to this act. The Governor may lift the stay authorized under this act at any time. A person may not be held civilly liable and is not subject to regulatory or

disciplinary sanctions for taking any action to comply with a stay issued by the Governor pursuant to this act.

(3) Upon the issuance of a stay, the chief judge of the circuit court shall appoint a guardian ad litem for the patient to make recommendations to the Governor and the court.

Section 2. This act shall take effect upon becoming a law. Approved by the Governor October 21, 2003. Filed in Office Secretary of State October 21, 2003.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

APPENDIX E

STATE OF FLORIDA

OFFICE OF THE GOVERNOR
EXECUTIVE ORDER NO. 03-201

WHEREAS, on October 21, 2003, the Florida Legislature passed House Bill 35-E (to be published as Public Law 03-418), signed this date by me, authorizing the Governor to issue a one-time stay in certain cases where, as of October 15, 2003, the action of withholding or withdrawing nutrition or hydration from a patient in a permanent vegetative state has already occurred and there is no written advance directive and a family member has challenged the withholding or withdrawing of nutrition and hydration; and

WHEREAS, under House Bill 35-E a person may not be hold civilly liable and is not subject to regulatory or disciplinary sanctions for taking any action to comply with a stay issued by the Governor pursuant to House Bill 35-E; and

WHEREAS, in the case of Theresa Marie Schindler Schiavo, Robert Schindler and Mary Schindler, the parents of Theresa Marie Schindler Schiavo, have requested that the Governor enter a stay prohibiting further withholding or withdrawing of nutrition or hydration; and

WHEREAS, a court has found that Theresa Schiavo is in a persistent vegetative state as of October 15, 2003; and

WHEREAS, Theresa Schiavo had no written advance directive as of October 15, 2003; and

WHEREAS, nutrition and hydration have been withdrawn from Theresa Schiavo, and continues to be withheld as of October 15, 2003; and

WHEREAS, the Schindlers have challenged the withdrawal and withholding of nutrition and hydration as of October 15, 2003; and

WHEREAS, an immediate and urgent need has arisen to address the removal of nutrition or hydration, because death due to lack of nutrition and hydration is imminent;

NOW THEREFORE, I, JEB BUSH, Governor of the State of Florida, by the powers vested in me by the Constitution and laws of the State of Florida, specifically House Bill 35-E, do hereby promulgate the following Executive Order, effective immediately:

Section 1.

A. Effective immediately, continued withholding of nutrition and hydration from Theresa Schiavo is hereby stayed.

B. Effective immediately, all medical facilities and personnel providing medical care for Theresa Schiavo, and all those acting in concert or participation with them, are hereby directed to immediately provide nutrition and hydration to Theresa Schiavo by means of a gastronomy tube, or by any other method determined appropriate in the reasonable judgment of a licensed physician,

C. While this order is effective, no person shall interfere with the stay entered pursuant to this order.

D. This order shall be binding on all persons having notice of its provisions.

E. This order shall be effective until such time as the Governor revokes it.

F. The Florida Department of Law Enforcement shall serve a copy of this Executive Order upon the medical facility currently providing care for Theresa Schiavo.

APPENDIX F

IN THE SUPREME COURT OF THE
STATE OF FLORIDA

Case No.: SC04-925

JEB BUSH, Governor of the State of Florida,
Appellant,

v.

MICHAEL SCHIAVO, as Guardian of the Person of
THERESA MARIE SCHIAVO,
Appellee.

INITIAL BRIEF OF APPELLANT JEB BUSH, GOVERNOR OF THE STATE OF FLORIDA

KENNETH L. CONNOR
Florida Bar No. 146298
CAMILLE GODWIN
Florida Bar No. 974323
WILKES & MCHUGH, P.A.
One North Dale Mabry, Suite 800
Tampa, Florida 33609
Phone: (813) 873-0026
Facsimile: (813) 872-1836
Counsel for Appellant

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	vi
PRELIMINARY STATEMENT	1
STATEMENT OF THE STANDARD OF REVIEW	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	6
ARGUMENT	9
I. The Circuit Court Misused And Misapplied Judicial Notice To Bypass The Elements Required For Application Of Collateral Estoppel And *Res Judicata* And Thereby Denied The Governor The Due Process Necessary To Defend The Constitutionality Of The Act	9
A. Summary Judgment Must Be Denied Where Issues Of Material Fact Remain For Resolution	9
B. Summary Judgment Must Be Denied Where The Circuit Court Erred In Depriving The Governor Of His Due Process Rights To Conduct Discovery And To Present His Case To A Jury	10
C. The Circuit Court Erred In Improperly Using Judicial Notice As A Means Of Determining Adjudicative Facts	12
D. The Circuit Court Erred In Applying *Res Judicata* And Collateral Estoppel To Bar Discovery And Trial	17

TABLE OF CONTENTS—Continued

Page

E. Because Of The Circuit Court's Denial Of The Governor's Due Process Rights, This Court Does Not Have A Competent Factual Record For Review 21

II. The Circuit Erred In Shifting The Burden Of Proof To The Governor To Establish The Constitutionality Of The Act 22

A. Legislative Enactments Come To The Courts Cloaked With A Strong Presumption Of Constitutionality 22

B. Schiavo Bears The Burden Of Proving That The Actions Of The Legislature And The Governor Infringed Upon The Privacy Rights Of Terri Schiavo 24

III. The Circuit Court Erred In Entering Summary Final Judgment In Favor Of Schiavo Because The Statute At Issue Is Constitutional On Its Face And As Applied To The Known Facts Of This Case 27

A. The Circuit Court Erred In Finding The Act Facially Unconstitutional Where At Least One Construction of The Act Would Render It Constitutional 27

B. The Act Is Constitutional As Applied To Terri Schiavo Because It Does Not Violate Her Privacy Rights 28

1. The Circuit Court Erred In Not Requiring Schiavo To Meet His Burden Of Showing The Act Violated Terri Schiavo's Right To Privacy 28

TABLE OF CONTENTS—Continued

Page

2. The Circuit Court's Order Needlessly Expands The *Browning* Decision 29

3. *Browning* Does Not Control Because The Facts Of This Case Are Distinguishable From The Facts In *Browning* 30

4. The *Browning* Language Relied Upon By The Circuit Court Is Not Applicable Because The Legislature Has Amended The Life Prolonging Procedures Act 31

C. While The Act Does Not Violate Privacy Rights, The Act, Furthers Compelling State Interests 31

1. The State Of Florida Has A Compelling Interest In Protecting And Preserving Human Life And In Ensuring That Its Residents' Right To Life Is Protected 34

2. The State Of Florida Has A Compelling Interest In Protecting The Rights Of Third Parties And In Maintaining The Ethical Integrity Of The Medical Profession 36

3. The State Of Florida Has A Compelling Interest In Protecting People With Disabilities From Violations Of Their Rights Because Of Their Disabilities 38

D. The Act Is Narrowly Tailored To Effect Compelling State Interests In The Least Intrusive Manner Possible 39

TABLE OF CONTENTS—Continued

	Page
IV. The Act Is Consistent With And Does Not Violate The Doctrine Of Separation Of Powers	40
A. The Act Is A Valid Exercise Of Inherent Legislative Powers In Areas Undeniably Subject To Legislative Authority And Is Not An Encroachment On Judicial Authority	41
B. The Legislature May Properly Act To Affect Prior Court Decisions	44
C. The Act Is A Valid Delegation Of Legislative Powers	47
1. The Act Must Be Construed In *Pari Materia* With Chapter 765, Florida Statutes	47
2. Simply Because The Act Gives Some Discretion To The Governor In Implementation Does Not Render The Act An Unconstitutional Delegation	49
CONCLUSION	50
CERTIFICATE OF SERVICE	51
CERTIFICATE OF COMPLIANCE	51

TABLE OF AUTHORITIES

CASES Page

Abreu v. State, 837 So. 2d 400 (Fla. 2003)..... 18
Amos v. Moseley, 77 So. 619 (Fla. 1917)..... 13-14
Askew v. Cross Keys Waterways, Inc., 371 So. 2d 913 (Fla. 1979)..... 49
Burgess v. State, 831 So. 2d 137 (Fla. 2002)..... 13
Bush v. Holmes, 767 So. 2d 668 (Fla. lst DCA 2000)..... 22, 28
Bush v. Schiavo, 866 So. 2d 136 (Fla. 2d DCA 2004).....2, 3, 4, 12
Caribbean Conservation Corp. v. Florida Fish and Wildlife Conservation Commission, 838 So. 2d 492 (Fla. 2003)..... 1
Chapman v. Reddick, 25 So. 673 (Fla. 1899)..... 41
Chiles v. Children, 589 So. 2d 260 (Fla. 1991)..... 40
Coalition for Adequacy and Fairness v. Chiles, 680 So. 2d 400 (Fla. 1996)..... 41
Conner v. Joe Hatton, Inc., 216 So. 2d 209 (Fla. 1968)..... 49
Corbett v. D 'Allessandro, 487 So. 2d 368 (Fla. 2d DCA 1986)..... 47
Cox v. Florida Dept. of Health and Rehabilitative Services, 656 So. 2d 902 (Fla. 1995)..... 18
Cruzan v. Missouri Dept of Public Health, 497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990).....34-36, 42
DeCancino v. Eastern Airlines, Inc., 283 So. 2d 97 (Fla. 1973)..... 19
Department of Health and Rehabilitative Services v. Privette, 617 So. 2d 305 (Fla. 1993)..... 9
E.C. v. Katz, 731 So. 2d 1268 (Fla. 1999)..... 20

TABLE OF AUTHORITIES—Continued

	Page
The Florida Bar v. Clement, 662 So. 2d 690 (Fla. 1995)	19
Glendale Federal Savings and Loan v. Dept. of Insurance, 485 So. 2d 1321 (Fla. 1st DCA 1986), *rev. denied*, 494 So. 2d 1150 (Fla. 1986)	2
Gray v. Central Florida Lumber Co., 140 So. 320 (Fla. 1 932)	22
Gulf Coast Home Health Services of Florida, Inc. v. Dept. of Health and Rehabilitative Services, 503 So. 2d 415 (Fla. 1st DCA 1987)..	12-13
Holl v. Talcott, 191 So. 2d 40 (Fla. 1966)	10
Holt v. Brown 's Repair Serv. Inc., 780 So. 2d 180 (Fla. 2d DCA 2001)	19
Huff v. State, 495 So. 2d 145 (Fla. 1986)	13-14
In re Guardianship of Browning, 568 So. 2d 4 (Fla. 1990)	7, 29-31, 33-34, 42-43, 47
In re Jobes, 108 N.J. 394, 529 A.2d 434 (N.J. 1987)	35
J.A.S. v. State, 705 So. 2d 1381 (Fla. 1998)	27
Jones v. The Upjohn Company, 661 So. 2d 356 (Fla. 2d DCA 1995)	18
Kostecos v. Johnson, 85 So. 2d 594 (Fla. 1956)....	14-15
Krischer v. McIver, 697 So. 2d 97 (Fla. 1997)..	32, 36, 39
Larsen v. Lesser, 106 So. 2d 188 (Fla. 1958)	1
Lee v. Gadasa Corporation, 680 So. 2d 1107 (Fla. 1st DCA 1996)	12
Lykes Bros., Inc. v. Board of Com 'rs of Everglades Drainage Dist., 41 So. 2d 898 (Fla. 1949)	9
Makos v. Prince, 64 So. 2d 670 (Fla. 1953)	13
Medina v. Yoder Auto Sales, Inc., 743 So. 2d 621 (Fla. 2d DCA 1999)	10

TABLE OF AUTHORITIES—Continued

Page

North Florida Women 's Health and Counseling Svcs., Inc. v. State, 866 So. 2d 612 (Fla. 2003).....2, 9, 25-26, 35, 32

Olins, Inc. v. Avis Rent-A-Car System, 131 So. 2d 20 (Fla. 3d DCA 1961)..... 11

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211,115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995)..... 46

Renee B. v. Florida Agency for Health Care Administration, 790 So. 2d 1036 (Fla. 2001).... 26

Satz v. Perlmutter, 3 79 So. 2d 359 (Fla. 1980).... 35

Schindler v. Schiavo. 780 So. 2d 176 (Fla. 2d DCA 2001) (*Schiavo I*).....4, 30-31, 34

Schindler v Schiavo, 792 So. 2d 551 (Fla. 2d DCA 2001) (*Schiavo II*) 4, 5, 21, 31, 42, 44-45

Schindler v. Schiavo, 800 So. 2d 640 (Fla. 2d DCA 2001) (*Schiavo III*).....4, 31, 37

Schindler v. Schiavo, 851 So. 2d 182 (Fla. 2d DCA 2003) (*Schiavo IV*) 4, 31, 46

Shaktman v. State, 553 So. 2d 148 (Fla. 1989)..... 25, 29

Southern Bell Telephone and Telegraph Company v. Robinson, 389 So. 2d 1084 (Fla. 3d DCA 1980) 20

State v. Bales, 343 So. 2d 9 (Fla. 1977)..... 23

State v. Giamanco, 682 So. 2d 1193 (Fla. 4th DCA 1996) 27-28

State v. Giorgetti, 868 So. 2d 512 (Fla. 2004)..... 22

State v. Ramirez, 850 So. 2d 620 (Fla. 2d DCA 2003)..... 13

State Employees Attorneys' Guild v. State, 653 So. 2d 487 (Fla. lst DCA 1995 .....

Stogniew v. McQueen, 656 So. 2d 917 (Fla. 1995)..... 19-20

Taylor v. Dorsey, 190 So. 2d 876 (Fla. 1944)....22-23, 40

TABLE OF AUTHORITIES—Continued

	Page
United States v. Jones, 29 F.3d 1549 (11th Cir. 1994)	14
United States v. Salerno, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)	27, 31
Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126 (Fla. 2000)	1
Wilson v. State of Florida, 857 So. 2d 190 (Fla. 2003)	45
Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544 (Fla. 1985)	26, 32

STATUTES AND RULES

FLA. STAT. § 86.07(1)	11
FLA. STAT. § 90.202	12
FLA. STAT. § 744.102	42
FLA. STAT. § 744.3215	42
FLA. STAT. § 744.361	42
FLA. STAT. § 744.367	42
FLA. STAT. § 744.391	42
FLA. STAT. § 765.101	42
FLA. STAT. § 765.202	42
FLA. STAT. § 765.302	42
FLA. STAT. § 765.303	42
FLA. STAT. § 765.304	42-43
FLA. STAT. § 765.401	43, 47
FLA. STAT. § 765.404	42
FLA. STAT. § 810.015(1)(A)	45
FLA. STAT. § 893.101(1)	45
FLA. STAT. § 893.135(7)	45
FLA. STAT. § 925.11	45
Chapter 88-225, Laws of Fla	46
Chapter 89-41, Laws of Fla	46
Chapter 89-91, Laws of Fla	46
Chapter 97-39, Laws of Fla	46

TABLE OF AUTHORITIES—Continued

Page

Chapter 98-3, Laws of Fla 46
Chapter 2003-418, Laws of Fla ..... *passim*
Fla. R. Civ. P. 1.280 11
Fla. R. Civ. P. 1.430 11
Fla. R. App. P. 9.03 0(b)(1)(A) 3
Fla. R. App. P. 9.030(a)(2)(B) 3

CONSTITUTIONS

Art. 1 § 2, FLA. CONST. 34, 39, 41
Art. 1 § 22, FLA. CONST. 11
Art. 1 § 23, FLA. CONST. 24, 29
U.S. CONST. amend. VII 11
U.S. CONST. amend. XIV, § 1 11

OTHER AUTHORITIES

Executive Order 03-201 ..... *passim*
Declaration of Independence 35

PRELIMINARY STATEMENT

This appeal follows from a May 17, 2004 order of the Court for the Sixth Judicial Circuit granting Summary Final Judgment in favor of Appellee Michael Schiavo, finding Ch. 2003-418, Laws of Florida, unconstitutional and finding Executive Order No. 03-201 void and of no legal effect. Throughout this Brief, Appellant Jeb Bush, Governor of the State of Florida, shall be referred to as "the Governor," or "Appellant," and Appellee, Michael Schiavo, Guardian of the Person of Theresa Marie Schiavo, shall be referred to as " Schiavo" or "Appellee." The ward, Theresa Marie Schiavo, shall be referred to as "Terri," and references to the record will be cited as "(R.

STATEMENT OF THE STANDARD OF REVIEW

The standard of review for an order granting summary judgment is de novo. *Volusia County v. Aberdeen at Ormond Beach*, L.P., 760 So. 2d 126, 130 (Fla. 2000). Further, because the order at issue has determined that a legislative enactment is unconstitutional, unlike other final orders, it does not arrive at this Court cloaked with a presumption of correctness. To the contrary, this Court must presume Ch. 2003-418 to be constitutional. *Larsen v. Lesser*, 106 So. 2d 188, 191 (Fla. 1958). The standard of review of a finding of unconstitutionality of a statute is de novo. *Caribbean Conservation Corp. v. Florida Fish and Wildlife Conservation Commission*, 838 So. 2d 492, 500 (Fla. 2003); *North Florida Women 's Health and Counseling Svcs., Inc. v. State*, 866 So. 2d 612 (Fla. 2003); *Glendale Federal Savings and Loan v. Dept. of Insurance*, 485 So. 2d 1321, 1323 (Fla. 1st DCA 1986), *rev. denied*, 494 So. 2d 1150 (Fla. 1986).

STATEMENT OF THE CASE

On October 21, 2003, Schiavo filed a Petition for Declaratory Judgment and Request for Temporary Injunction in the Circuit Court of the Sixth Judicial Circuit, Pinellas

County. (R. 1-10). Schiavo's action challenges the constitutionality of Chapter 2003-418, Laws of Florida. (R. 2).

On December 22, 2003, the Governor filed a Petition for Writ of Certiorari to the Second District Court of Appeal based on the circuit court's grant of Schiavo's motion for protective order precluding the Governor from taking discovery in the underlying cause. *Bush v. Schiavo*, 866 So. 2d 136, 137 (Fla. 2d DCA 2004). The Petition alleged the trial court erred by not requiring Schiavo to establish good cause for the requested relief. *Id.* at 138. Absent the discovery requested, the Governor argued he would be foreclosed from developing and presenting evidence to defend against the claims of unconstitutionality and would be unable to establish a factual record from which an appellate court could review the decisions made by the circuit court. *Id.*

The Second District granted the Petition for Writ of Certiorari on February 13, 2004. *Id.* at 140. In granting the Writ, the Second District agreed the circuit court erred by not requiring Schiavo to demonstrate good cause to prevent the depositions sought by the Governor. *Id.* at 138. The Second District also directed the circuit court to conduct an inquiry into "the parties' legal arguments concerning the status of the adjudicated facts as a subject of further inquiry." *Id.* at 139-140. However, on May 5, 2004, the circuit court again granted Schiavo's motion for a protective order, again precluding discovery. (R. 1347-1351). On the same date, the circuit court also granted Schiavo's Motion for Summary Judgment. (R. 1324-1346). Pursuant to Fla. R. App. P. 9.030(b)(1)(A), the Governor then filed a Notice of Appeal on May 6, 2004. (R. 1352-1376).[1] On June 16, 2004, pursuant

[1] On May 12, 2004, the Second District found the May 5, 2004 order not sufficiently final and relinquished jurisdiction for entry of a final order. On May 14, 2004, the circuit court entered a Summary Final Judgment. (R.1377-1399). The Governor filed a Notice of Appeal as to that order on May 17, 2004.

to the authority of Fla. R. App. P. 9.030(a)(2)(B), this Court accepted jurisdiction.

STATEMENT OF FACTS

On February 25, 1990, Terri Schiavo had a cardiac arrest and subsequent loss of oxygen to her brain, which led to serious brain damage. (R. 25). The guardianship court determined that she is in a "persistent vegetative state." (R. 1388). Since May of 1998, Schiavo has sought to discontinue the provision of food and water to Terri, presently delivered to her through a tube. (R. 25). It is uncontroverted that removal of this tube will inevitably kill her by starvation and dehydration. *Id.* Schiavo's efforts to deny basic sustenance to his estranged wife have sparked substantial legal controversy. *See Bush v. Schiavo*, 866 So. 2d at 138 n.l.

It is undisputed that Terri had no written advance directive. (R. 574; 607). It is also undisputed that her parents have vigorously resisted Schiavo's efforts to end their daughter's life through starvation or dehydration. (R. 606-608; 1220-1232); *See also, Schindler v. Schiavo*, 780 So. 2d 176 (Fla. 2d DCA 2001) ("*Schiavo I*"); *Schindler v. Schiavo*, 792 So. 2d 551 (Fla. 2d DCA 2001) ("*Schiavo II*"); *Schindler v. Schiavo*, 800 So. 2d 640 (Fla. 2d DCA 2001) ("*Schiavo III*"), and *Schindler v. Schiavo*, 851 So. 2d 182 (Fla. 2d DCA 2003) ("*Schiavo IV*"). Her parents continue to vigorously contest the continued appropriateness of Schiavo to serve as Terri's guardian and on April 26, 2004, successfully petitioned the guardianship court for a Writ of *Quo Warranto* seeking to have Schiavo establish the lawfulness of his actions as Terri's guardian.[2] Her parents also contend that Terri, while admit-

---

[2] The Petition is attached as an exhibit to the Governor's Motion to Stay Appeal Proceedings Pending Resolution of Writ of *Quo Warranto* Directed to Michael Schiavo, filed in this appeal proceeding with the Second District on June 1, 2004.

tedly disabled due to brain damage, is able to recognize her parents, track with her eyes and is a candidate for swallowing therapy which, if successful, may eliminate the need for a feeding tube at all. (R. 1009-1013); *Schiavo I* at 178.; *Schiavo III* at 643-644.

Terri does not have a terminal illness and her death is not imminent. *Schiavo I* at 180. Notwithstanding the foregoing, Pinellas County Circuit Judge George W. Greer found that Terri was in a persistent vegetative state and on February 11, 2000, authorized removal of the tube providing her with food and water. (R. 67-76); *Schiavo II* at 554-555. Further, despite the fact that her husband had an admitted conflict of interest when he sought permission to end her life (he was the sole beneficiary of her estate), at the time the order was entered authorizing her starvation and dehydration, Terri had no independent advocate. (R. 67-70). On October 15, 2003, Terri's feeding tube was withdrawn. (R. 1388-1389).

On October 21, 2003, the Florida Legislature, apprehending the irrevocable harm likely to result from the withdrawal of food and water to disabled people unable to express their healthcare choices, enacted Ch. 2003-418, a narrowly tailored law authorizing the Governor to issue a one time stay preventing withholding of food and water from an individual if, as of October 15, 2003:

a) The patient has no written advance directive;

b) The court has found the patient to be in a persistent vegetative state;

c) The patient has had nutrition and hydration withheld; and

d) A member of the patient's family has challenged the withholding of nutrition and hydration.

Ch. 2003-418, Sec. 1 and 2. The Act also provides that "upon issuance of a stay, the chief judge of the Circuit shall appoint

a guardian ad litem for the patient to make recommendations to the Governor and the court." Ch. 2003-418, Sec. 3.

On October 21, 2003, Governor Bush, pursuant to the authority of the Act, issued a stay to prevent the withholding of nutrition and hydration from Terri. (R. 587-588). After enduring six days with no food or water, Terri was once again provided with basic sustenance. (R. 479, 600). Schiavo then filed his Petition seeking to have the Act declared unconstitutional. In opposition, the Governor filed a number of affidavits and made numerous attempts at obtaining discovery. (R. 669-811; 909-945; 948-976; 981-1116; 1123-1165; 1214-1215; 1296-1298; 1315-1316; 1320-1321; 1493).

On May 6, 2004, the circuit court held the Act unconstitutional. (R. 1324-1346). Notwithstanding the Governor's contention that Terri's wishes were in dispute, the Governor was not afforded the benefit of discovery, an evidentiary hearing, or the jury trial he emphatically and repeatedly demanded. (R. 152-154; 337-340; 400-402; 483-485; 571-572; 574-579; 580-584; 901-908; 1170-1199; 1214-1215; 1296-1314).

SUMMARY OF ARGUMENT

Florida's legislative, executive and judicial branches play co-equal roles in protecting the lives and health care choices of persons who, by disability, are especially vulnerable to the consequences of abuse, exploitation or mistake. The circuit court erred in ignoring this co-equal role and entering summary judgment declaring the Act unconstitutional without permitting the Governor discovery or a jury trial to determine disputed material facts.

Instead of adhering to such fundamental procedural safeguards, the circuit court erroneously substituted "judicial notice" of orders entered in cases to which the Governor was not a party and which involved factual issues not identical to those in this case. In so doing, the court misapplied concepts of res judicata and collateral estoppel to recognize as

adjudicated "facts" found in guardianship proceedings not involving the Governor.

A finding of an infringement on the "right to privacy" requires adjudication of facts. The trial court erred in failing to require Schiavo to establish by competent, substantial evidence that the Act infringed upon Terri's right to privacy. Such proof required, at a minimum, that Schiavo submit admissible evidence that under the present circumstances Terri wants to be deprived of food and water. This, he did not do. Moreover, even assuming such proof, the Act serves compelling state interests in the least restrictive means possible.

*In re Guardianship of Browni*ng, 568 So. 2d 4 (Fla. 1990), does not dictate the outcome of this case. Subsequent to the legislature's enactment of Chapter 765, Florida Statutes, its limited holding establishes only that the right to privacy encompasses end of life decisions for incapacitated persons. Any extension of that holding to the instant case rests on mere dictum. Because *Browning* does not preordain the result in this case, the legislature acted well within its constitutional authority in promulgating the Act. As a further refinement of the guardianship and end of life provisions of Chapters 765 and 744, Florida Statutes, the Act in no way impermissibly interferes with judicial authority. Nor does it encroach on an existing judicial order. Of necessity, such orders are inherently executory and never "final" in the traditional sense.

The Act was a valid delegation of power to the Governor. Although some discretion was vested in the Governor, the legislature made the ultimate policy decision by promulgating the Act. The Act provided definitive guidelines for its implementation by the Executive.

This Court should reverse the summary judgment of the trial court, permit the Governor to take discovery and require a jury trial on all disputed material facts. Any other

result violates due process under the Florida and federal constitutions.

ARGUMENT

I. The Circuit Court Misused And Misapplied Judicial Notice To Bypass The Elements Required For Application Of Collateral Estoppel And *Res Judicata* And Thereby Denied The Governor The Due Process Necessary To Defend The Constitutionality Of The Act.

A. Summary Judgment Must Be Denied Where Issues Of Material Fact Remain For Resolution.

The question of the constitutionality of a statute "is an issue of law, or of mixed fact and law, depending upon the nature of the statute brought into question and the scope of its threatened operation as against the party attacking the statute." *Lykes Bros., Inc. v. Board of Corn 'rs of Everglades Drainage Dist.*, 41 So. 2d 898 (Fla. 1949); *North Florida*, 866 So. 2d at 626 (Fla. 2003). Factual questions precluded entry of summary judgment, because, in this case, the constitutionality of the statute is a mixed question of law and fact. *Glendale Federal Savings and Loan Association v. Department of Insurance*, 485 So. 2d 1321, 1324-25 (Fla. 1st DCA 1986). As such, there must be an adequate record developed in the lower court before a fact-finder. *State Employees Attorneys' Guild v. State*, 653 So. 2d 487 (Fla. 1st DCA 1995) ("Such a proceeding will permit the development of a record which this court properly may review to decide the issues raised in this case"). As this Court stated in *Department of Health and Rehabilitative Services v. Privette*, 617 So. 2d 305, 309 (Fla. 1993):

> However, a compelling interest does not come into existence in the abstract but must be based on adequate factual allegations and a record establishing that the test itself is in the child's best interests.

As the party moving for summary judgment, Schiavo was required to prove the absence of dispute on genuine issues of material fact. *See Holl v. Talcott*, 191 So.2d 40, 43 (Fla. 1966) (movant must conclusively prove that no genuine issues of material fact exist). Moreover, "[t]he proof must be such as to overcome all reasonable inferences which may be drawn in favor of the opposing party." *Id. See also Medina v. Yoder Auto Sales, Inc.*, 743 So.2d 621 (Fla. 2d DCA 1999) ("[i]f the record reflects the existence of any genuine issue of material fact, or the possibility of any issue, or if the record raises even the slightest doubt that an issue might exist summary judgment is improper"). The record, such as it is, and viewed in a light most favorable to the Governor, is replete with genuine issues of material fact and thus bars the entry of summary judgment.

B. Summary Judgment Must Be Denied Where The Circuit Court Erred In Depriving The Governor Of His Due Process Rights To Conduct Discovery And To Present His Case To A Jury.

As in the case of any other party to civil litigation, the Governor has both procedural and substantive due process rights guaranteed under both Florida and federal law. These rights include the right to discovery, the right to cross-examine witnesses, and the right to a jury trial or an evidentiary hearing with respect to factual matters. *See, e.g.*, Art. 1, § 22, FLA. CONST.; U.S. CONST. amend. VII; U.S. CONST. amend. XIV, § 1; and Rules 1.430 and 1.280, Fla. R. Civ. P.

The fact that the issues in the underlying cause were raised in the form of a declaratory judgment action challenging the constitutionality of a statute does not strip the Governor of fundamental due process rights, nor deprive him of his right to a jury trial. The right to jury trial is expressly preserved in the declaratory judgment statute:

> When an action under this chapter concerns the determination of an issue of fact, the issue may be tried as

> issues of fact are tried in other civil actions in the court in which the proceeding is pending. To settle questions of fact necessary to be determined before judgment can be rendered, the court may direct their submission to a jury. When a declaration of right or the granting of further relief based thereon concerns the determination of issues of fact triable by a jury, the issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict is required or not.

FLA. STAT. § 86.07(1); *See also Olins, Inc. v. Avis Rent-A-Car System*, 131 So. 2d 20, 21 (Fla. 3d DCA 1961) (The right of trial by jury exists as to those issues which were triable before a jury at common law, regardless of the form of proceeding which may be used for their solution.). If a jury found, for example, that it was not Terri's wish to be denied food and water and so informed the court in an interrogatory verdict, the court could then find that her right to privacy was not being infringed, an absolute prerequisite to determining the constitutionality of the Act. It is the trial court's attempt to circumvent this fact-finding obligation through judicial notice that gives rise to reversible error in this case.

C. The Circuit Court Erred In Improperly Using Judicial Notice As A Means Of Determining Adjudicative Facts.

At the case management conference the circuit court took judicial notice of several orders entered in the guardianship case pertaining to Terri. (R. 600-604). The Governor did not oppose taking notice that such orders existed, but he contended that taking judicial notice of the orders was not equivalent to having the facts recited therein become adjudicated facts in the instant matter.[3] (R. 602-604; 1180-

---

[3] In the Second District's opinion in Bush v. Schiavo, 866 So. 2d at 139 n.2, the court noted that certain stipulations not in that record were

1184). *See Lee v. Gadasa Corporation*, 680 So. 2d 1107 (Fla. 1st DCA 1996).

Under the Florida Evidence Code, the circuit court could take judicial notice of its own records or those of another court if the records of the other court were properly submitted. § 90.202, FLA. STAT. (2003). Such notice appropriately includes "the identity of the parties and their counsel, the lower tribunal from which an appeal was taken and the provisions of the order on appeal, issues presented in the briefs, the status of a file within the court, and the dates of orders of the trial and appellate courts." *Gulf Coast Home Health Services of Florida, Inc. v. Dept. of Health and Rehabilitative Services*, 503 So. 2d 415 (Fla. 1st DCA 1987). Judicial notice, however, may never be used as a vehicle to admit otherwise inadmissible hearsay. *State v. Ramirez*, 850 So. 2d 620 (Fla. 2d DCA 2003). Even if an entire court file is judicially noticed, all documents contained in that court file are still subject to the same rules of evidence to which all evidence must adhere. *Burgess v. State*, 831 So. 2d 137 (Fla. 2002). As this Court has warned, "the practice of taking judicial notice of adjudicative facts should be exercised with great caution" as "the taking of evidence, subject to established safeguards, is the best way to resolve disputes concerning adjudicative facts." *Makos v. Prince*, 64 So. 2d 670, 673 (Fla. 1953). Judicial notice may not be used to dispense with proof of essential facts not otherwise judicially cognizable. *Amos v. Moseley*, 77 So. 619, 623 (Fla. 1917).

In *Huff v. State*, 495 So. 2d 145 (Fla. 1986), this Court considered the appropriateness of a trial court's use of findings from an earlier criminal trial:

> In the supplemental findings, the trial court judge stated that he took judicial notice of the *Huff I* proceedings "in

---

agreed to by the Governor and Schiavo in the matter below. These stipulations are a part of this record. (R. 1387-1389).

> fairness to the defendant as well as the state." This interest in fairness is unquestionably laudable and represents perhaps the ultimate goal of our system of justice. However, we find that in a situation such as is presented here, where, upon appellate review an accused has been granted a new trial, the utilization by judicial notice of evidence produced at the first trial constitutes a process which would make facts conclusive against an opposing party although these facts were unsupported by the evidence introduced in the new trial, **and were therefore not subject to refutation by the party against whom they were offered**. The concept of judicial notice is essentially premised on notions of convenience to the court and to the parties; some facts need not be proved because knowledge of the facts judicially noticed is so notorious that everyone is assumed to possess it. As we held over a half-century ago, . . . the courts should not exclude from their knowledge matters of general and common knowledge which they are presumed to share with the public generally. . . . It has been well said, however that "This power is to be exercised by courts with caution. . . . The courts of the land which are charged with the great responsibility of determining matters **upon which the life and death of a human being may depend**, can well be trusted to exercise the proper caution in determining what matters it will take judicial notice of. It is upon the wisdom and discretion of the judges of our courts, that the doctrine of judicial notice must rest." *Amos v. Mosley*, 74 Fla. 555, 567-68, 77 So. 619, 623 (1917) (emphasis added).

Id. at 151. By improperly accepting as fact selected portions of matters in the guardianship file, the circuit court constructed Schiavo's entire case for him. By precluding discovery and a jury trial on the disputed facts, the circuit court effectively stripped the Governor of any means of challenging Schiavo's case, thereby creating an irrebuttable presumption of unconstitutionality.

The Governor expressly pointed out to the court the limits of judicial notice and argued that the circuit court could not properly rely on evidence from the guardianship case in ruling on the motion for summary judgment. (R. 610-613; 1180-1187); *United States v. Jones*, 29 F.3d 1549 (11th Cir. 1994) (a court may take notice of another court's order only for the limited purpose of recognizing the "judicial act" that the order represents or the subject matter of the litigation). In Kostecos v. Johnson, 85 So. 2d 594 (Fla. 1956), this Court explained the common sense rationale of this requirement:

> The judgment recites that the trial judge took judicial notice of the entire contents of the records in the two delinquent tax cases. Undoubtedly he could conveniently call upon the office of the clerk of the court to bring the records before him and make them available for his examination in arriving at a judgment. Upon appeal, however, this court is not similarly situated and we are, therefore, obviously without the information contained in the two records in the circuit court of Sarasota County which may or may not have properly constituted the basis of the summary judgment that was entered because these records do not constitute a part of the record on appeal unless they were appropriately introduced in evidence either in the original or by certified copy and then included in the record sent to this court for consideration.

Kostecos, 85 So. 2d at 595.

Finally, the discovery sought by the Governor in the circuit court is not an attempt to merely revisit matters considered in the guardianship case. The issue in this case is not what Terri's wishes were in the past, but, rather, what her wishes would be now, in light of the **present** circumstances. The issue of Terri's wishes under the present circumstances has never been adjudicated and that is the pivotal issue underlying the question of the constitutionality of the Act. Determination of the constitutionality of the statute here first

requires a finding as to whether the Act infringes on Terri's privacy rights. The Governor has a right to conduct discovery and have an evidentiary hearing at a bare minimum on this issue.

The record in this appeal, as scarce as it is, provides examples of some of the factual issues ripe for discovery. At the hearing on Schiavo's Motion for Summary Judgment, the Governor's counsel proffered a number of questions he wished to ask Schiavo, including:

1) Why wasn't Terri's purported desire to die discussed with the jury in the malpractice case that gave rise to a seven-figure settlement?
2) Why did Schiavo present evidence regarding the cost of a life-care plan during that malpractice case when he knew that Terri wouldn't want to live under those circumstances?
3) Why were nurses' notes which documented Terri's rehabilitation potential deleted from her chart at the Palm Gardens Nursing Home?
4) Why were observations of the nursing assistants regarding Tern's level of function and responsiveness deleted from her chart?
5) What did Schiavo mean when he purportedly said at Palm Gardens Nursing Home: "When is she going to die?" "Has she died yet?" When is that bitch going to die?" "Can't you do anything to accelerate her death?" "Won't she ever die?"
6) What does Schiavo know about the multiple traumatic injuries of relatively recent origin which were found to be present in the bone scan conducted by Dr. Campbell Walker in March of 1991?
7) Was Terri miserable in her marriage and was Schiavo controlling, as was attested to in Robert Schindler, Jr.'s affidavit?

8) What would Terri's desires be regarding who should make endof-life decisions for her if she, knew that her husband was living with another woman with whom he conceived two children?

9) Did Terri recant her Catholic faith, which teaches that removing her feeding tube because of her quality of life has been diminished, or to intentionally cause her death would be improper?

(R. 1493-1496; 679; 684-686; 713-716; 726-728; 788-789; 791-792; 799; 806-807; 814-881; 886; 987-989;1001-1002;1099-1101;1014-1045;1132-1133).

Just days prior to the summary judgment hearing the Governor urged Jay Wolfson, Ph.D., the guardian ad litem appointed for Terri pursuant to the authority of the Act, to investigate a number of additional issues, (all of which remain unanswered) including:

1) What would Terri experience in the process of dying by starvation?

2) Why was the previous guardian ad litem discharged?

3) What specific statements did Terri make regarding her wishes if she was found to be in a persistent vegetative state?

4) Are there conflicts of interest between Terri and her guardian, Michael Schiavo?

The most important question was this: "Is there sufficient clear and convincing evidence remaining to determine her wishes in these specific circumstances?" (R. 1204-1206).

D. The Circuit Court Erred In Applying Res Judicata And Collateral Estoppel To Bar Discovery And Trial.

By misapplying judicial notice in entering summary judgment, the circuit court relied upon legal conclusions and

borrowed facts gleaned from legal proceedings to which the Governor was not a party and thus had no opportunity to cross examine witnesses or otherwise participate. As such, *res judicata* and collateral estoppel do not apply here. *Jones v. The Upjohn Company*, 661 So. 2d 356 (Fla. 2d DCA 1995) ("strangers to a prior litigation—those who were neither parties nor in privity with a party—are not bound by the results of that litigation). The trial court could not properly rely on testimony given in another proceeding as a substitute for competent evidence in the current proceeding. Without question, these borrowed assertions of fact are improper hearsay. *Abreu v. State*, 837 So. 2d 400 (Fla. 2003).

Further, mere naked allegations of fact are insufficient to support an "as applied" constitutional challenge. In *Cox v. Fla. Dept. of Health and Rehabilitative Services*, 656 So. 2d 902 (Fla. 1995), this Court held that even in a case where the parties waived an evidentiary hearing and allowed the case to proceed to resolution with the parties simply submitting briefs, the record was insufficient to determine whether a statute could be sustained against a constitutional attack.

For collateral estoppel to apply to bar relitigation of an issue, five factors must be present:

> (1) an identical issue must have been presented in the prior proceeding; (2) the issue must have been a critical and necessary part of the prior determination; (3) there must have been a full and fair opportunity to litigate that issue; (4) the parties in the two proceedings must be identical; and (5) the issues must have been actually litigated.

Holt v. Brown's Repair Serv. Inc., 780 So. 2d 180, 181-182 (Fla. 2d DCA 2001).

Further, for the preclusive effect of *res judicata* to apply, the two actions must share both identity of the matter sued for and identity of the cause of action. *The Florida Bar v.*

Clement, 662 So. 2d 690 (Fla. 1995). The party claiming benefit of collateral estoppel bears the burden to show that an issue common to both causes of action was previously determined with sufficient certainty. *DeCancino v. Eastern Airlines, Inc.*, 283 So. 2d 97, 99 (Fla. 1973). Schiavo has offered nothing to meet this burden.

In *Stogniew v. McQueen*, 656 So. 2d 917 (Fla. 1995), this Court addressed the issue of collateral estoppel and the requirement of mutuality of parties. In that case, the State of Florida brought an administrative action against a therapist for unprofessional behavior. *Id.* at 918. Later, the patient also filed a negligence action against the therapist. While both actions were pending, the disciplinary body found that the therapist had acted inappropriately. *Id.* at 918-919. The patient then moved for a partial summary judgment in the negligence action claiming that the matter had been foreclosed, the disciplinary body having found that the therapist acted in an inappropriate manner. *Id.* at 919. The Court refused to accept that argument, and held:

> Florida has traditionally required that there be a mutuality of parties in order for the doctrine to apply. Thus unless both parties are bound by the prior judgment, neither may use it in a subsequent action. . . . Further, we are unwilling to follow the lead of certain other states and of the federal courts in abandoning the requirement of mutuality in the application of collateral estoppel.

Id. at 919-920. *See also, Southern Bell Telephone and Telegraph Company v. Robinson*, 389 So. 2d 1084 (Fla. 3d DCA 1980) (estoppel requires judgment between adversaries); *E.C. v. Katz*, 731 So. 2d 1268 (Fla. 1999) (estoppel did not bar relitigation of alleged abuse where defendant was not party to previous proceeding).

Accordingly, neither *res judicata* nor collateral estoppel apply. Of the prior orders and judgments that may have been issued in matters to which the Governor was not a party, the

Governor had no opportunity to take discovery, cross-examine witnesses, or put on evidence. The issue in this case is the constitutionality of the Act—a question never at issue in any of the previous matters litigated between the Schindlers and Schiavo. Indeed, the actions of the legislature and the Governor did not even arise until October 21, 2003, well after the orders in the prior proceedings were rendered. It is the Governor who has been brought into court by Schiavo and accused of violating Terri's rights. The Governor is entitled to probe and to test Schiavo as to what Tem's wishes are under these **present circumstances**. Here, the circuit court foreclosed such discovery and improperly used judicial notice of prior cases and orders to accomplish collateral estoppel and *res judicata* without the elements of either having been met independently.

Finally, application of *res judicata* and collateral estoppel, particularly under the present circumstances, simply makes no sense. In *Schiavo II*, the Second District recognized that guardianship orders are non-final orders and may be challenged right up until the moment of death. *Schiavo II* at 559. In practice, that means that if Terri can speak or can swallow foods, thus obviating the need for the tubes providing nutrition and hydration, the issues presented here will be moot. In the context of guardianship proceedings, orders are not final until the death or discharge of the ward for the obvious reason that the facts surrounding the care and wishes of a ward are likely to change over time as circumstances evolve. As such, *res judicata* and collateral estoppel are especially inappropriate. Resolution of the question of whether the Act violates Terri's right to privacy thus requires a factual inquiry and a determination by a trier of fact.

E. Because Of The Circuit Court's Denial Of The Governor's Due Process Rights, This Court Does Not Have A Competent Factual Record For Review.

As noted earlier, the question of whether a law infringes upon an asserted right to privacy is a mixed question of law and fact. In this case, the factual question is, "what are Terri's wishes under the present circumstances." Absent a factual record established and subjected to the rigors of discovery and cross examination there was no competent basis on which the trial court could find any asserted right of privacy. The circuit court's failure to provide the opportunity to develop this record is clear reversible error.

II. The Circuit Court Erred In Shifting The Burden Of Proof To The Governor To Establish The Constitutionality Of The Act.

A. Legislative Enactments Come To The Courts Cloaked With A Strong Presumption Of Constitutionality.

Courts must follow well-established rules when faced with an inquiry into the constitutionality of a challenged statute. This Court repeated these canons earlier this year in *State v. Giorgetti*, 868 So. 2d 512 (Fla. 2004):

> We are also obligated to construe statutes in a manner that avoids a holding that a statute may be unconstitutional. In *Gray v. Central Florida Lumber Co.*, 104 Fla. 446, 140 So. 320 (1932), this Court listed several canons of construction to be followed in interpreting statutory acts: (1) On its face every act of the Legislature is presumed to be constitutional; (2) every doubt as to its constitutionality must be resolved in its favor; (3) if the act admits of two interpretations, one of which would lead to its constitutionality and the other to its unconstitutionality, the former rather than the latter must be adopted. . . . *Id.* at 323.

Giorgetti, 868 So. 2d at 518. *See also, Bush v. Holmes*, 764 So. 2d 668, 673 (Fla. 1st DCA 2000) ("[w]hen a legislative enactment is challenged the court should be liberal in its interpretation; every doubt should be resolved in favor of the constitutionality of the law, and the law should not be held invalid, unless clearly unconstitutional beyond a reasonable doubt") (citing *Taylor v. Dorsey*, 190 So. 2d 876, 882 (Fla. 1944)). Thus, unless and until the Act at issue is determined to violate Terri's right to privacy (a factual finding which must consider her wishes under present circumstances), the Act remains presumptively constitutional.

In addition to carrying a strong presumption of constitutionality, legislative enactments also travel with a rebuttable presumption that the provisions of the statute are supported by any necessary facts. *State v. Bales*, 343 So. 2d 9 (Fla. 1977). As this Court explained in Bales: "If any state of facts, known or to be assumed, justify the law, the court's power of inquiry ends." *Id.* at 11. Clearly, the importance of the factual record in challenges to constitutionality of statutes is a critical consideration for any appellate court.

With these canons in mind, the Governor urges this Court to construe the statute in a manner which recognizes that the Act, rather than violating the right to privacy, actually protects the health care decisions of an incompetent patient who has not memorialized her health care choices in writing. Although the burden was on Schiavo to establish an infringement of Terri's constitutional rights, it was the Governor who sought basic discovery in the underlying case to establish facts from which a jury could decide whether or not Tern's right to privacy was infringed. Again, notwithstanding that the burden remained on Schiavo, the Governor also sought to establish facts from which a jury could find, even in the face of an infringement of privacy, that the statute at issue served compelling state interests and was narrowly tailored to effect those interests.

In a case such as Terris, where there is no competent evidence concerning her present intent, where her family strongly disagrees with Schiavo's bare assertions of Terri's wishes, where Schiavo's own conflict of interest in living with another woman and bearing children with her may persuade a jury to discount his statements as to Terri's wishes, where the risks of mistake, abuse or exploitation are high, and where the consequences of a mistake would be undeniably fatal, the legislature, by ensuring an independent evaluation of the patient's wishes under a discrete set of circumstances, has *advanced*, rather than inhibited, the privacy rights of the individuals sought to be protected. An undeniable dispute exists over Terri's wishes. In defending this action, the Governor sought to bring all available facts regarding her wishes to the surface. In contrast, Schiavo's goal has been to avoid such a fact-finding process at all costs.

B. Schiavo Bears The Burden Of Proving That The Actions Of The Legislature And The Governor Infringed Upon The Privacy Rights Of Terri Schiavo.

The circuit court found that the Act is unconstitutional because it infringes on the right of privacy under Art. I, § 23, FLA. CONST., of those affected by it, including Terri. However, the mere incantation of privacy is insufficient to shift the burden to the Governor to establish a compelling state interest justifying an alleged infringement. *See Shaktman v. State*, 553 So. 2d 148, 153 (Fla. 1989) (Ehrlich, C.J., concurring) ("whether an individual has a legitimate expectation of privacy in any given case must be made by considering all the circumstances, especially objective manifestations of that expectation"). Should there be a finding that the Act and its implementation violate Terri's right to privacy, the burden then shifts to the Governor to justify the action by identifying compelling state interests which warrant a narrowly tailored response through legislative means. *North Florida Women's*

Health and Counseling Service v. State, 866 So. 2d 612 (Fla. 2003).

In *North Florida*, this Court found the Parental Notice of Abortion Act unconstitutional. The Court applied the "compelling state interest" standard after finding that the act imposed a significant restriction on a minor's right of privacy. *Id.* at 631. Before finding that privacy rights were violated, this Court had the benefit of an extensive competent record from the circuit court, including depositions, testimony at a two and a half day evidentiary hearing, and a five-day bench trial. *Id.* at 616. This Court noted that all witnesses "were subjected to the crucible of cross-examination," and that all "the proceedings comported with the legal requirements of the Florida Rules of Civil Procedure, and all evidence met the formal requirements of the Florida Evidence Code." *Id.* at 630. Even after the oral argument to this Court, the record was supplemented with fifteen additional volumes of supplemental material and two lengthy documentary exhibits. *Id.* at 616.

Significantly, the first question this Court focused on was whether the act at issue implicated a minor's right of privacy. This focus was appropriate because, "before the right of privacy attaches `a reasonable expectation of privacy must exist." *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 547. This Court employed the same analytical framework to hold that a rule precluding state funding of abortions did not infringe on the right to privacy and thus did not require the strict scrutiny analysis. *Renee B. v. Florida Agency for Health Care Administration*, 790 So. 2d 1036 (Fla. 2001) ("The strict scrutiny standard, however, would only be necessary in the instant case if it is first determined that the challenged rules violate the petitioners' right of privacy.").

The court below, however, jumped immediately to the second question, finding from incompetent evidence that the

first question had already been answered in different proceedings to which the Governor was not a party and which occurred prior to the enactment of the Act. In doing so, the circuit court not only relieved Schiavo of his burden to prove his case but also precluded the Governor from making a record to defend the Act.

The importance of the disputed facts in this case cannot be overemphasized. Very simply, the facts make all the difference and they have yet to be developed. This Court spoke directly to the inherently context-based nature of privacy rights analysis in *J.A.S. v. State*, 705 So. 2d 1381, 1387 (Fla. 1998):

> [While] it would simplify [the] privacy analysis if we could fashion a precise equation by which all could easily determine which interest should prevail in whatever context a privacy right is asserted . . . the human experience is not so easily categorized or quantified and no single formula can be crafted for deciding issues which implicate the most personal and intimate forms of conduct and privacy, . . . If we blinded ourselves to the unique facts of each case, we would render decisions in a vacuum with no thought to the serious consequences of our decisions for the affected parties and society in general.

The circuit court permitted Schiavo to do that which is never appropriate in contested civil proceedings, i.e., to prove his case on mere presumptions.

III. The Circuit Court Erred In Entering Summary Final Judgment In Favor Of Schiavo Because The Statute At Issue Is Constitutional On Its Face And As Applied To The Known Facts Of This Case.

A. The Circuit Court Erred In Finding The Act Facially Unconstitutional Where At Least One Construction of The Act Would Render It Constitutional.

A facial challenge must show that a legislative enactment is invalid under all possible applications. A facial challenge can succeed only if the law in question cannot operate constitutionally under any set of circumstances. *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987) ("The fact that [a legislative] Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid"). Therefore, if a law has a single constitutional application, it will survive the challenge. *State v. Giamanco*, 682 So. 2d 1193 (Fla. 4th DCA 1996). This heavy burden makes such an attack the most difficult challenge to mount successfully against an enactment. *Bush v. Holmes*, 767 So. 2d at 677 (Fla. 1st DCA 2000).

During the hearing on Schiavo's Motion for Summary Judgment, counsel for the Governor clearly explained at least one set of circumstances under which the law would without question be constitutional:

> But if, for example, you took a young wife and mother who was found to be in a persistent vegetative state, she had no previous advanced written directive, her only oral declaration was that she would not want to be deprived of food and water, but she had a husband who stood to gain from her death through ignorance or lack of scruples and who was able to convince the hospital or healthcare provider to remove the feeding tube, and the family contested the removal, clearly under those cir-

> cumstances one could not be deemed to say that the constitutional right to privacy was being infringed.

(R. 1490). Because there is at least one set of facts under which the Act is constitutional, the facial challenge must fail.

B. The Act Is Constitutional As Applied To Terri Schiavo Because It Does Not Violate Her Privacy Rights.

1. The Circuit Court Erred In Not Requiring Schiavo To Meet His Burden Of Showing The Act Violated Terri Schiavo's Right To Privacy.

An "as-applied" challenge agrees that a law has a constitutional application, but argues that it is unconstitutional as applied to the party bringing the challenge. Again, the burden remains on Schiavo to establish the unconstitutionality. To do so, Schiavo first had to prove that Terri's right to privacy was infringed. *Shaktman v. State*, 553 So. 2d at 153 (Fla. 1989). Schiavo alleged that he proved this essential fact in the prior guardianship case, and the circuit court improperly took judicial notice of that prior finding as an adjudicated fact in this case. Because the circuit court did not require Schiavo to meet his burden in this case and under the present circumstances, the privacy analysis was never triggered.

2. The Circuit Court's Order Needlessly Expands The *Browning* Decision.

Notwithstanding the lack of competent and substantial evidence of Terri's wishes, the circuit court incorrectly assumed that the outcome of this case is dictated by this Court's decision and reasoning in *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990). *Browning* stands for a simple proposition, i.e. that under Art. I, § 23 of the Florida Constitution (Florida's explicit right to privacy) a person has the constitutionally protected right to choose or reject medical

treatment, which right may be exercised by his or her surrogate in the event that the person is unable to exercise her right because of her medical condition. *Browning*, 568 So. 2d at 7-8. In exercising this right, the surrogate must make the decision which the patient would personally choose (the concept of substituted judgment). However, in overemphasizing the importance of *Browning*, the order below provides a tortured interpretation and expansion of that decision which goes far beyond the holding.

3. *Browning* Does Not Control Because The Facts Of This Case Are Distinguishable From The Facts In *Browning*.

The facts in the case at bar are dramatically different from those in *Browning*. In *Browning*, the eighty-eight year old patient had expressed her desires regarding health care in writing on two separate occasions prior to the time she became incompetent from a stroke and before her guardian petitioned for approval to withdraw sustenance. *Browning*, 568 So. 2d at 8. Those written desires included a specific stipulation that she not be afforded "nutrition and hydration provided by gastric tube or intravenously" where the application of life prolonging procedures served only to prolong the dying process. *Id.* In stark contrast, the much younger Terri had no written expression of any kind regarding her desires for future medical care under the circumstances at hand. Mrs. Browning's life expectancy was only one year at the most at the time of the hearing on her guardian's petition. *Id.* at 9. Tern's life expectancy is substantially longer. *See Schiavo I* at 180.

In *Browning*, there was no other family member who challenged the withholding of food and water. Here, the parents raise just such a challenge. In *Browning*, there was no evidence of a conflict of interest between the guardian and the ward. In this case, her parents have complained repeatedly that Schiavo has a financial interest in Terri's death and is

otherwise conflicted such that he cannot adequately or credibly represent Terri's desires or best interests. (R. 606-608; 1220-1232); *See also Schiavo I; Schiavo II; Schiavo III;* and *Schiavo IV*. In light of the material differences between *Browning* and Terri's case (and in all cases in the class protected by the Act), it is clear that *Browning* does not control here.

4. The *Browning* Language Relied Upon By the Court Is Not Applicable Because The Legislature Has Amended The Life Prolonging Procedures Act.

Browning stands for only the constitutional mandate that an incompetent person has a right to refuse medical treatment. *Browning*, 568 So. 2d at 7. The remainder of the *Browning* language simply sets up a procedural framework for implementing that right. This framework is now unnecessary because the legislature has acted to provide a statutory framework that did not exist prior to *Browning*. Ch. 92-199, Laws of Fla. To the extent the Court set up a procedural framework for implementing the right to privacy of incompetent persons, the legislature replaced that framework with Chapter 765. *Schiavo II* at 557.

C. While The Act Does Not Violate Privacy Rights, The Act Furthers Compelling State Interests.

Even if Schiavo had succeeded in proving Terri's privacy interest (which he did not), courts have long recognized that the rights of individuals are not absolute and have balanced them against other state interests. *Browning*, 568 So. 2d at 14; *Salerno*, 481 U.S. at 748, 750-51. In Florida, when a legislative enactment is found to impinge on a fundamental right, courts apply a strict scrutiny test which demands that the "compelling state interest standard" be met. *North Florida v. State*, 866 So. 2d 612 (Fla. 2003); *Krischer v. McIver*, 697 So. 2d 97, 104 (Fla. 1997) (Overton J. concurring) (". . . once

a privacy right has been implicated, the government must show a compelling interest to justify the intrusion.") *See also Winfield*, 477 So. 2d 544. The compelling interest test shifts the burden of proof to the State to justify an intrusion on privacy. *North Florida*, 866 So. 2d at 625, n.16. The Act passes the test.

By passing the Act, the legislature added to the existing provisions of Chapter 765 and provided needed safeguards to assure that a discrete category of patients who were particularly vulnerable to abuse, exploitation or mistake had their health care choices respected. The Act was passed because of the legislature's concerns that the rights of certain disabled citizens were imperiled due to a gap in the Life-Prolonging Procedures Act permitting the withdrawal of food and nutrition from such persons. (R. 950-952; 1115; 1067; 1005-1006; 1125-1129; 1136-1137; 1140-1143; 1146-1147). In his affidavit filed in this case, Representative John Stargel explained that "HB-35E prospectively adds protections to the lives of certain incompetent residents of Florida reflecting the Legislature's dissatisfaction with the effect of the previous law," and that:

> Nothing on the face of HB-35E questions the propriety or authority of the determination of how chapter 765 and the constitutional right to privacy applied to Terri Schiavo's situation at the time of prior court orders authorizing withholding of nutrition and hydration.[4]

(R. 950-952).

---

[4] Representative Johnnie Byrd expressed similar concerns in his affidavit:

> HB 35-E was passed because the procedures provided by Chapter 765 and as interpreted by the Browning decision, had, as applied in Terri Schiavo's case, threatened to cause her judicially-ordered starvation or dehydration without safeguards deemed adequate to the Legislature in which is vested the responsibility to regulate such matters.

(R. 1136-1137).

Thus, the Act facially applies only in instances when no written advance directive exists, where a family member has disputed the withholding of nutrition and hydration, where a court has found the patient to be in a persistent vegetative state, and where a family member has challenged the withdrawal of nutrition and hydration. That is, the Act only applies when life is at its most vulnerable. Under such circumstances, the State has an especially compelling interest in providing a process which will ascertain as certainly as possible, prior to actions which will cause the irreversible demise of the patient, what the individual's desires were so as to preclude the termination of life in a manner which would be against the patient's wishes.

Even under the circuit court's tortured view of *Browning*, i.e., that Terri's fundamental constitutional right to privacy is implicated by the Act, further analysis is still required. The fact that a statute may impinge on a fundamental right, is not the end of the discussion regarding the statute's constitutionality—it is merely the beginning of the analysis.

1. The State Of Florida Has A Compelling Interest In Protecting And Preserving Human Life And In Ensuring That Its Residents' Right To Life Is Protected.

The Florida Constitution recognizes the fundamental nature of the right to life: "All natural persons, female and male alike, . . . have inalienable rights, among which are the right to enjoy and defend life. . . ." Art. 1, § 2, FLA. CONST., The Florida Supreme Court in *Browning* and the U.S. Supreme Court in *Cruzan* acknowledged the compelling nature of this interest. *Browning*, 568 So. 2d at 14; *Cruzan v. Missouri Dept. of Public Health*, 497 U.S. 261, 271-280, 110 S.Ct. 2841, 2854, 111 L.Ed.2d 224, 283 (1990).

The right to life is that right without which no other right can exist. All other rights, no matter how fundamental, derive

from and depend upon the right to life. The right to speak freely, to worship according to one's conscience, or to vote for the candidate of one's choice—all are rights reserved for the living. The right to privacy, so heavily relied on by the circuit court in this case, means nothing to a corpse. No doubt this is why Florida's Second District Court of Appeal declared: that the "court's default position [when balancing the state's interest in protecting life and an individual's right to privacy] must favor life." *Schiavo I* at 179.

Because of the fundamental nature of this right, the State has not only a compelling interest in protecting and preserving human life, but also an absolute duty to do so. Governments were instituted to secure unalienable rights. The Declaration of Independence, Para. 1. Since the right to life is, indisputably, a compelling state interest, it must be protected by agencies of state government:

> A constitution would be a meaningless instrument without some responsible agency of the government having authority to enforce it. . . When the people have spoken through their organic law concerning their basic rights, it is primarily the duty of the legislative body to provide the ways and means of enforcing such rights. . .

Satz v. Perlmutter, 397 So. 2d 359, 361 (Fla. 1980).

In this case, the State has a particularly compelling interest where end of life decisions involve an incompetent or disabled person who cannot speak for herself. As the U.S. Supreme Court reasoned in *Cruzan*:

> Not all incompetent patients will have loved ones available to serve as surrogate decision makers. And even where family members are present "there will of course be some unfortunate situations in which family members will not act to protect a patient." *In re Jobes*, 529 A.2d 434, 447 (N.J. 1987). A state is entitled to guard against potential abuses in such situations.

Cruzan, 497 U.S. at 281.

Another reason to require heightened protections for persons like Terri is apparent: an erroneous decision not to terminate the withdrawal of sustenance results merely in maintenance of the status quo, but "an erroneous decision to withdraw life-sustaining treatment, however is not subject to correction." *Id.* at 283. The Florida Legislature recognized that the withdrawal of nutrition and hydration from an individual is certain to kill her, that death is final, and that there is precious little margin for error. The legislature, therefore, provided a much needed extra layer of protection for patients who were deemed by a court to be in a persistent vegetative state, who had no written advance directives, who were denied sustenance, and whose family member contests the withdrawal of food and water. The Act serves particularly compelling state interests in this context to protect life without unduly encroaching on the right to privacy. When balancing two fundamental rights, the courts must err on the side of life. *Cruzan*, 497 U.S. at 283.

2. The State Of Florida Has A Compelling Interest In Protecting The Rights Of Third Parties And In Maintaining The Ethical Integrity Of The Medical Profession.

In the context of privacy cases, the protection of innocent third parties and the maintenance of the ethical integrity of the medical profession are compelling state interests. *Krischer*, 697 So. 2d at 102-103. Justice Overton's concurring opinion in *Krischer* quoted Justice Stevens, "The value to others of a person's life is far too precious to allow the individual to claim a constitutional entitlement to complete autonomy in making a decision to end that life." *Id.* at 105. There is no question that Terri's parents have gone to great lengths to show the courts and the public the value they place on their daughter's life. Significantly, in the *Browning* case there were no such third party interests at issue. *Browning*, 568 So. 2d at 14.

The court in *Browning* suggested that the last and least significant state interest in a privacy case regarding the withdrawal of sustenance is the maintenance of the ethical integrity of the medical profession. *Id.* This interest is extremely significant in a state home to more senior citizens than any other state and who, increasingly, are being threatened by the cultural shift from a "sanctity of life" ethic to a "quality of life" ethic. Evidence of this shift can even be found in the Second District's opinion in *Schiavo III* which expressed a belief that Terri might only choose to live if her "quality of life" were improved. *Schiavo III* at 645. More and more, the net worth of the handicapped and the frail elderly is being computed by quality of life calculus, cost benefit ratios and functional capacity studies. In this environment, the State clearly has a compelling interest in preserving the integrity of the medical profession by preventing it from falling into this utilitarian trap.[5]

Unlike Estelle Browning, Terri authored no written advance directive memorializing her wishes. Unlike *Browning*, Terri's case involves disputes about the *bona fides* of the guardian and conflicting interests between the guardian and the ward. (R. 606-608; 1220-1232). In the absence of a written advance directive, members of the medical profession can be manipulated by healthcare surrogates who stand to gain from the death of a ward. Protecting the medical profession from becoming witting or unwitting dupes of those

---

[5] *See "Waking from the Dead,"* Wesley Smith, First Things 136 (October 2003): *21-23*: "Under the doctrine known as `futile-care theory,' many bioethicists urge that doctors be given the power to refuse wanted life-sustaining treatment based on their views about the lack of quality of their patients' lives. This would include not only tube-supplied food and fluids but potentially other medical interventions such as antibiotics, fever reduction, and respirators. Among the first—but certainly not the only—patients that are being targeted for unilateral withholding of wanted treatment are profoundly cognitively disabled people . . .—that is, patients suffering from long-term unconsciousness.

who would exploit an incompetent patient and protecting vulnerable patients from the unscrupulous in the medical community are compelling state interests served by the Act.

3. The State Of Florida Has A Compelling Interest In Protecting People With Disabilities From Violations Of Their Rights Because Of Their Disa

People with incapacitating disabilities are vulnerable to all manner of abuse, exploitation or mistake, because they cannot speak for themselves or defend themselves. Unable to communicate their needs and wishes, they must rely on others to act as substitute decision-makers. The range of decisions a substitute may be called upon to make may be as routine as selecting a physician or as extraordinary and grave as deciding when and under what circumstances to terminate the provision of food and water to a ward. The laws of this state endeavor to provide rules and procedures to ensure that the wishes of the ward are respected. Tern's case, however, exposed a distressing gap in the protections afforded under the law, i.e., the lack of an independent advocate for the ward where the ward's wishes are not in writing and where the evidence of her oral statements comes from a conflicted source. Recognizing this gap, the legislature crafted the additional protections provided in the Act.

The Florida Constitution guarantees that "[N]o person shall be deprived of any right because of race, religion, national origin, or physical disability." Art. I, § 2, FLA. CONST. This provision makes it clear that the State has a compelling interest in ensuring that people with disabilities are not deprived of basic human rights because of their disabilities. In a case involving the legality of Florida's law prohibiting assisted suicide and an asserted right of privacy, this Court recognized that the State `has a legitimate competing interest in protecting society against abuses." *Krischer*, 697 So. 2d at 101. The *Krischer* court also noted a number of abuses

pointed out by advocacy groups and recounted state interests in limiting the vulnerability of socially marginalized groups, preventing the devaluation of the lives of the disabled, and minimizing financial incentives to limit care. *Id.* at 101. The Act serves these compelling state interests as well.

D. The Act Is Narrowly Tailored To Effect Compelling State Interests In The Least Intrusive Way Possible.

Plainly, the Act had to create a mechanism by which hydration and nutrition could be resumed or the operation of time would result in the patient's death before any activities of the guardian *ad litem* could commence. Thus the Act's provision for an indefinite "stay" was not only the least intrusive means to accomplish the Act's purposes, but it was the only means to do so. The Act allowed the Governor to preserve Terri's life until a guardian *ad litem* could be appointed, review the evidence, investigate, and make recommendations to the Governor and the court. The Act creates no burden upon the privacy rights of an individual, but rather, seeks to accurately determine what the person's wishes were and to effectuate those desires.

IV. The Act Is Consistent With And Does Not Violate The Doctrine Of Separation Of Powers.

The Florida Constitution provides that the three branches of state government have certain inherent powers, which are divided among them to avoid the concentration of power that leads to tyranny. *See Chiles v. Children*, 589 So. 2d 260, 263 (Fla. 1991). The wisdom of this separation is without dispute. Further, in contrast to the U.S. Constitution, which operates as a delegation of powers to the government, the Florida Constitution operates as a limitation on governmental powers, in order to protect the rights of citizens secured by it. *See Taylor v. Dorsey*, 19 So. 2d 876, 881 (Fla. 1944) ("'Our state constitution is a limitation upon power, and, unless legislation

duly passed be clearly contrary to some express or implied prohibition contained therein, the courts have no authority to pronounce it invalid.'") (quoting *Chapman v. Reddick*, 25 So. 673, 677 (Fla. 1899)).

Article I, § 2 of the Florida constitution thus operates to secure and limit the powers of government, further providing that "no person shall be deprived of any right because of physical disability." This includes the right to life. The State has a duty and the power to actively defend life, as well as a duty to avoid exercising its powers in a manner that deprives a person of life because of physical disability. No branch of government has a monopoly on protecting these rights, and each of the three branches of government have discrete roles to play. *Coalition for Adequacy and Fairness v. Chiles*, 680 So. 2d 400, 407 (Fla. 1996).

A. The Act Is A Valid Exercise Of Inherent Legislative Powers In Areas Undeniably Subject To Legislative Authority And Is Not An Encroachment On Judicial Authority.

The mandate to remove Terri's feeding tube took place in the context of two areas of law in which the legislature unquestionably has authority to act: guardianship and the termination of life-prolonging procedures. If every act done pursuant to these statues automatically infringes on privacy, every statute here would always be subject to strict scrutiny analysis—a ridiculous position. Although court jurisdiction over guardianship cases arose from equitable powers of chancery, under the Florida Constitution, the rules of equity in this area have been superseded by the imposition of statutory standards codified in Chapter 744, Florida Statutes. *Schiavo II*, 792 So. 2d at 558. For example, the legislature defines the terms used in guardianship, imposes procedural requirements, and delineates the rights of the ward and duties of the guardian. *See* FLA. STAT. § 744.102; FLA. STAT. § 744.391; FLA. STAT. § 744.3215; FLA. STAT. § 744.361;

FLA. STAT. § 744.367. Here, the legislature merely acted to amend the laws governing guardianship of a ward by providing an additional process: authorizing a stay of the termination of the ward's life-prolonging procedures and requiring the appointment of a guardian *ad litem*. Ch. 2003-418. The power to regulate guardianships rests with the legislature, and the legislature's amendment to these laws does not encroach on judicial powers.

Similarly, while the order authorizing removal of Terri's feeding tube was a judicial act, that order took place within the context of established statutory provisions regarding termination of life-prolonging procedures. FLA. STAT. Ch. 765. In these provisions, the Florida Legislature acted in response to the problems identified by cases such as *Cruzan* and *Browning* and attempted to provide an extensive framework for resolution of these issues. The legislature defined the terms used in end-of-life decision making, imposed procedural requirements, and delineated the ability of surrogates and proxies to act to remove life-prolonging procedures. See FLA. STAT. § 765.101; FLA. STAT. § 765.404; FLA. STAT. § 765.302; FLA. STAT. § 765.303; FLA. STAT., § 765.304; FLA. STAT. § 765.202; FLA. STAT. § 765.401. The legislature also delegated to the courts the power to determine and enforce certain end-of-life decisions, and set the standards for the courts to use in so acting. *See* FLA. STAT. § 765.105 (providing for judicial review of a surrogate's decision); FLA. STAT. § 765.304 (requiring findings in reviewing a disputed decision); FLA. STAT. § 765.401 (permitting substituted judgment and requiring "clear and convincing evidence" of an incapacitated person's wishes).

The legislature has superseded the elements of the *Browning* decision relied upon by the circuit court. It is the role of the courts to interpret the constitution and thereby identify the rights protected therein. The *Browning* Court identified two mandates arising out of the right to privacy in

the Florida Constitution: that persons have the right to choose or refuse medical care; and that this right extends to incapacitated persons. *Browning*, So. 2d at 11-12. This privacy right is not self-executing in the context of incapacitated persons. Therefore, the Court went on to impose a method for the exercise of the right, defining how the State was to identify and implement the wishes of such persons, which method was not part of the constitutional mandate. *Id.* at 13-17. However, once identified, it is the peculiar province of the legislature to determine how to protect constitutional rights. Thus, while the courts may properly find that an act affecting end of life decisions is subject to the right of privacy, it remains the province of the legislature to define methods, such as the Life-Prolonging Procedures Act, to give effect to the privacy right. When the elected representatives of the people of Florida enacted Chapter 765, Florida Statutes, the court-imposed method became unnecessary and inapplicable. The legislature continued to refine its statutory framework with the Act. Because the legislature's amendment of the life-prolonging procedures laws does not encroach on judicial powers, neither does the Act. *Browning* now stands only for the two constitutional mandates cited above.

B. The Legislature May Properly Act To Affect Prior Court Decisions.

The circuit court found that the Act encroaches on the role of the judiciary by "nullifying the final" court judgment authorizing removal of Terri's feeding tube. (R. 1389-1392). However, that order is not a final, dispositive decision by the court, because guardianship cases remain open until terminated by the death or recovered capacity of the ward. In a guardianship case, the judicial goal is not "finality," but the proper administration of the person and her estate, according to the ward's wishes. *Schiavo II*, 792 So. 2d at 559. Thus, as the Second District Court explained, such orders are not final, and may be challenged at any time:

> The order requiring the termination of life-prolonging procedures is not a standard legal judgment but an order in the nature of a mandatory injunction compelling certain actions by the guardian and, indirectly, by the health care providers. Until the life-prolonging procedures are discontinued, **such an order is entirely executory**, and the ward and guardian continue to be under the jurisdiction and supervision of the guardianship court.

Id. (emphasis added). The fact that the legislature acted to change the laws that govern guardianship and termination of life-prolonging procedures during the pendency of an open guardianship case is not a nullification of prior court orders in that case.

Even if the order authorizing removal of the feeding tube was final, courts have long recognized the legislature's ability to affect final orders and legislate in response to court rulings. In 2001, for example, the Florida Legislature enacted FLA. STAT. § 925.11, permitting post-sentencing DNA testing for convicted criminals. The act provided for an additional procedure for previously adjudicated cases, many of which had no further appeals pending or possible. This Court approved the actions of the legislature in *Wilson v. State of Florida*, 857 So. 2d 190 (Fla. 2003).

The legislature has also enacted statutes explicitly stating that a particular court decision was in error and should be nullified. See FLA. STAT. § 810.015(1)(a). The legislature has even enacted language in statutes to effectively overrule court decisions construing statutory provisions without changing the terms of the existing law. *See* FLA. STAT. § 893.135(7) (providing that two appellate court decisions correctly interpreted the legislature's intent); FLA. STAT. § 893.101(1) (finding a decision of the Florida Supreme Court contrary to legislative intent). On numerous occasions the legislature has announced its intent in enacting a statute by including discussions of court cases in the "whereas" clauses accompany-

ing the law. *See* Ch. 88-225, 89-41, 89-91, 97-39, 98-3, and 98-22, Laws of Fla. (R. 951).

The United States Supreme Court recognizes that legislatures have authority to alter the effect of previously entered executory judgments authorizing injunctive relief. *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 115 S. Ct. 1447, 1456-1457, 131 L.Ed.2d 328 (1995). Similarly, the legislature here agreed with the court in Schiavo IV that the available statutory framework was inadequate protection and acted to increase that level of protection. (R. 950-952; 962-963; 1066-1068; 1005-1006; 1125-1129; 1136-1137; 1140-1143; 1146-1147). As the court lamented in *Schiavo IV*:

> It may be unfortunate that when families cannot agree, the best forum we can offer for this private, personal decision is a public courtroom and the best decision-maker we can provide is a judge with no prior knowledge of the ward, but the law currently provides no better solution that adequately protects the interests of promoting the value of life.

Schiavo IV, 851 So. 2d at 187. Because the order in the guardianship case was not final, and because the ward's wishes in such a case must be reconsidered as circumstances change, the effect of the Act is prospective only and does not infringe on vested rights.

Even the circuit court recognized that nothing about the Act affects the earlier mandate of the court, as that mandate was already carried out before the Act was passed. (R. 1388). Thus, there was no outstanding order thwarted by the actions of the legislature.

C. The Act Is A Valid Delegation Of Legislative Powers.

1. The Act Must Be Construed In Pari Materia With Chapter 765, Florida Statutes.

Construed in *pari materia* with Chapter 765, Florida Statutes, the Act does not constitute an unconstitutional

delegation of powers by the legislature. *See Corbett v. D'Alessandro*, 487 So. 2d 368 (Fla. 2d DCA 1986). Specifically, § 765.401, FLA. STAT., refers to various proxies who may enter proceedings and act in circumstances where a patient has not previously executed an advanced directive. By passing the Act, the legislature determined that the Governor should be permitted to act as a proxy in a very narrow set of circumstances. This provision was not available at the time of the decisions and orders in the guardianship case.

In *Browning* this Court acknowledged that it "cannot ignore the possibility that a surrogate might act contrary to the wishes of the patient." *Browning*, 568 So. 2d at 15. That concern is heightened in the circumstances of individuals who fall within the class protected by the Act. In such cases, it is easy to see how a person with no written advance directive could be exploited—especially in a case where the surrogate decision maker stands to gain from the patient's demise or may be motivated to act by something other than the desires of the patient. The Florida Legislature, therefore, in a statute narrowly drawn to protect a discrete class of extraordinarily vulnerable people, authorized a stay and mandated the appointment of a guardian *ad litem* upon the issuance of a stay. Ch. 2003-418.

By requiring the appointment of a guardian *ad litem*, the legislature indicated its intent that the Governor ascertain Terri's wishes. Ch. 2003-418. Further, the Governor is required to do so based on the present circumstances, which may be different than the circumstances at the time of the guardianship decisions. These circumstances include the facts that Schiavo has essentially abandoned his marital relationship, and also that the Pope, the highest human authority pursuant to Terri's Catholic faith, has recently issued the following statement:

> I should like particularly to underline how the administration of water and food, even when provided by

> artificial means, always represents a natural means of preserving life, not a medical act. Its use, furthermore, should be considered, in principle, ordinary and proportionate, and as such morally obligatory, insofar as and until it is seen to have attained its proper finality, which in the present case consists in providing nourishment to the patient and alleviation of his suffering.

Address of John Paul II to the Participants in the International Congress on "Life Sustaining Treatments and Vegetative State: Scientific Advances and Ethical Dilemmas, "March 20, 2004.

2. Simply Because The Act Gives Some Discretion To The Governor In Implementation Does Not Render The Act An Unconstitutional Delegation.

The Act itself constitutes the legislative policy decision that certain vulnerable adults require additional protection. (R. 948-954; 960-973; 1003-1006; 1064-1068; 1110-1116; 1123-1129; 1134-1147; 1153-1156). Having made this fundamental policy decision, the legislature enacted a law with all the necessary guidelines for its implementation by the executive. Before the Governor may issue a stay, all four of the criteria specified in the Act must be present. Ch. 2003-418. Thus, in contrast to the legal issue in *Askew v. Cross Keys Waterways, Inc.*, 371 So. 2d 913 (Fla. 1979), the Act contains sufficient guidelines such that both the Governor and the trial courts can determine whether the Governor is carrying out the intent of the legislature. *Id.* at 918-919. The Act specifically provides for a guardian *ad litem* to make recommendations to the Governor addressing Terri's wishes, in conjunction with the provisions of Chapter 744, Florida Statutes. The fact that some authority, discretion, or judgment is necessarily required to be exercised in carrying out the Act does not invalidate it. *Conner v. Joe Hatton, Inc.*, 216 So. 2d 209 (Fla. 1968).

Neither the Life Prolonging Procedures Act nor the Act at issue can be viewed in a vacuum. Further, the Act must be construed liberally in a manner to effectuate its constitutionality if it reasonably can be the case. The construction adopted below, in concert with the impermissible presumption-based short circuit procedures employed by the circuit court, is a construction calculated to produce the unconstitutionality of the Act. However, the Governor has offered a construction of the Act that comports with constitutional requirements in that it provides an additional layer of protection for the most vulnerable disabled citizens.

CONCLUSION

Based on the foregoing arguments and authorities, Appellant Jeb Bush, Governor of the State of Florida, hereby requests this honorable Court to vacate the Summary Final Judgment and remand this matter to the Circuit Court for the Sixth Judicial Circuit to permit the development of a competent factual record through discovery and trial by jury. In the alternative, the Governor requests this Court find Chapter 2003-418 and the Governor's actions pursuant thereto to be constitutional.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express Overnight Delivery to **George J. Felos**, Felos & Felon, P.A., 595 Mann Street, Dunedin, Florida 34698; to **Thomas J. Perrelli, Robert M. Portman, Nicole G. Berner**, Jenner & Block, LLC, 601 13th Street, NW, Suite 1200, Washington, DC; to **Randall C. Marshall**, Legal Director, American Civil Liberties Union of Florida, 4500 .Biscayne Blvd., Suite 340, Miami, Florida, 33137; to **Jay Vail**, Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399; and to **David Cortman**, ACLJ, 1000 HurricaneShoals Road, Suite D-600, Lawrenceville, GA 30043, on this 6th day of July 2004.

/s/ Kenneth L. Connor
KENNETH L. CONNOR
CAMILLE GODWIN

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with Florida Rule of Appellate Procedure 9.210 requiring the font size of the type herein to be at least fourteen points if in Times New Roman format.

/s/ Kenneth L. Connor
KENNETH L. CONNOR
CAMILLE GODWIN

APPENDIX G

IN THE SUPREME COURT OF THE
STATE OF FLORIDA

Case No.: SCO4-925

JEB BUSH, Governor of the State of Florida,
Appellant,

v.

MICHAEL SCHIAVO, as Guardian of the Person of
THERESA MARIE SCHIAVO,
Appellee.

REPLY BRIEF OF APPELLANT JEB BUSH, GOVERNOR OF THE STATE OF FLORIDA

KENNETH L. CONNOR
Florida Bar No. 146298
CAMILLE GODWIN
Florida Bar No. 974323
WILKES & MCHUGH, P.A.
One North Dale Mabry, Suite 800
Tampa, Florida 33609
Phone: (813) 873-0026
Facsimile: (813) 872-1836
Counsel for Appellant

TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		iv
ARGUMENT		1
I.	SCHIAVO'S ANSWER BRIEF HIGHLIGHTS THE NEED FOR DEVELOPMENT OF A COMPETENT FACTUAL RECORD IN THE LOWER COURT.	1
II.	SCHIAVO AND THE LOWER COURT FAILED TO RECOGNIZE THE CRITICAL DISTINCTION BETWEEN AN IMPLICATION OF PRIVACY RIGHTS AND AN INFRINGEMENT OF PRIVACY RIGHTS	3
III.	BY ENTERING SUMMARY FINAL JUDGMENT FOR SCHIAVO, THE LOWER COURT VIOLATED THE GOVERNOR'S FEDERAL DUE PROCESS RIGHTS.	6
IV.	THE ACT DOES NOT ENDOW THE GOVERNOR WITH THE ABILITY TO NULLIFY FINAL ORDERS NOR STANDARDLESS DISCRETION TO IGNORE HEALTH CARE CHOICES	7
V.	THIS COURT SHOULD DECLINE TO ADDRESS SCHIAVO'S ALTERNATIVE GROUNDS FOR FINDING THE ACT UNCONSTITUTIONAL	9
	A. The Act Does Not Violate Equal Protection	9

TABLE OF CONTENTS—Continued

	Page
B. The Act Is Not An Unlawful Bill Of Attainder	10
C. The Act Is Not An Invalid Special Law	11
CONCLUSION	14
CERTIFICATE OF SERVICE	15
CERTIFICATE OF COMPLIANCE	16

TABLE OF AUTHORITIES

CASES	Page
Advisory Opinion to the Attorney General re: Florida Minimum Wage Amendment, 2004 WL 1574232 (Fla. 2004)	4
Cesary v. National Bank of North Miami, 369 So. 2d 9 17 (Fla. 1979)	12
City of Miami v. McGrath, 824 So. 2d 143 (Fla. 2002)	13
C.L. Whiteside and Associates Construction Company. Inc. v. The Landings Joint Venture, Inc., 626 So. 2d 105 1 (Fla. 4th DCA 1993)	9
Cox v. Florida Dept. of Health and Rehabilitative Services, 656 So. 2d 902 (Fla. 1995)	3
Dept. of Legal Affairs v. Sanford-Orlando Kennel Club, 434 So. 2d 879 (Fla. 1983)	12, 14
Gentile v. Bauder, 718 So. 2d 781 (Fla. 1998)	7
Hansberry v. Lee, 311 U.S. 32 (1940)	6
In re T.W., 551 So. 2d 1186 (Fla. 1989)	3
Mayes v. Moore, 827 So. 2d 967 (Fla. 2002)	11
North Florida Women's Health and Counseling Svcs., Inc. v. State, 866 So . 2d 612 (Fla. 2003)	3, 5
Plaut v. Spendthrift Farm, 115 S. Ct. 1447 (1995)	11
Renee B. v. Florida Agency for Health Care Administration, 790 So. 2d 1036 (Fla. 2001)	4, 5
Richards v. Jefferson County. Ala., 5 17 U S. 793 (1996)	6
Schindler v Schiavo, 792 So. 2d 55 1 (Fla. 2d DCA 2001) (Schiavo II)	7
Schrader v. Florida Keys Aqueduct Authority, 840 So. 2d 1050 (Fla. 2003)	12
Sembler v. Oregon State Board of Dental Examiners, 294 U S. 608, 55 S. Ct. 570 (1935)	10

TABLE OF AUTHORITIES—Continued

	Page
Shaktman v. State, 553 So. 2d 148 (Fla. 1989).....	5
Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).....	6
State v. Peters, 534 So. 2d 760 (Fla. 3rd DCA 1988).....	10
Thompson v. Haynes, 294 So. 2d 69, 71-72 (Fla. 1st DCA 1971).....	9
STATUTES AND RULES	
FLA. STAT. § 765.401.....	8
Chapter 2003-418, Laws of Fla.	14, 15
Fla. R. Civ. P. 1.280	6
Fla. R. Civ. P. 1.430	6
CONSTITUTIONS	
Art. 1 § 22. FLA. CONST.....	6
Art. 1 § 23. FLA. CONST.....	3
U.S. CONST. amend. VII	6
U.S. CONST. amend. XIV, 5 1.....	6
MISCELLANEOUS	
Random House Webster's Unabridged Dictionary, 961. 980 (2d ed. 2000)	4
Black's Law Dictionary, 124 1 (7th ed. 1999)	9

ARGUMENT

I. SCHIAVO'S ANSWER BRIEF HIGHLIGHTS THE NEED FOR DEVELOPMENT OF A COMPETENT FACTUAL RECORD IN THE LOWER COURT.

In his brief[1], Schiavo repeatedly argues that no discovery or trial is necessary in this case because the facts are irrelevant. (AB, pp. 5, 14). Notwithstanding this assertion, he also repeatedly makes explicit "factual" assertions as components of his arguments. Examples of these unsubstantiated and outside the record declarations are found throughout the Answer Brief.

The first such allegation appears in the statement of the case and facts, where Schiavo asserts, supported only by reference to two newspaper editorials, that "key legislators" now regret their vote on the Act. (AB, p. 2). In the same paragraph, Schiavo also alleges that these "key legislators" were pressured to vote as they did by "physical and political threats" from persons who are part of a "well-organized national campaign." Although cited in Schiavo's "Table of Authorities," these editorial columns were not provided in an appendix nor was any attempt made to bring the accusations contained therein properly into the record before this Court.[2] In fact, the statements attributed to the only two legislators named are nothing less than rank hearsay and point out the need in this case for competent evidence. In contrast, although not considered by the lower court, the Governor submitted numerous affidavits signed by legislators, describing their concerns and intent in proposing and in voting for the Act. (R. 950-952; 11 15; 1067; 1005-1006; 1125-1 129; 1136-1 137; 1140-1 143; 1146-1 147).

---

[1] Reference to the Answer Brief of the Appellee will be noted as (AB, page number)

[2] Schiavo also never advises the Court that the sources are not even newspaper articles, but rather, opinion columns.

Additional allegations in the Answer Brief include unsupported assertions that the Governor's allegations about Schiavo are false and "scurrilous" (AB, pp. 5, 7); that Terri is in a persistent vegetative state, and her cerebrum has mostly been replaced by spinal fluid (AB, p. 5); that denial of feeding "does not result in death by starvation" (AB, p. 6 n.5); that such a death is "painless" (AB, p. 6 n.5); that Terri's current life entails 'I never ending physical torture" (AB, p. 19 n. 17); that "Opponents to removal of artificial life support routinely charge family members with alleged financial 'conflicts' to impugn their motives." (AB, p. 7); and, that Terri would want to refuse food and fluids. (AB, p. 11 n.7, pp. 30, 50).

The last contention, that Terri would want to refuse food and fluids, is crucial because it is the very question the Governor has been repeatedly precluded from investigating in this case. Clearly, Schiavo seeks to have this Court accept his incompetent, extra-record allegations as fact, while depriving the Governor of the opportunity to rebut the extra-record claims and prove or disprove the truth of his claims. Schiavo's mere naked allegations of fact are wholly inadequate to support his attack on the constitutionality of the statute. *Cox v. Fla. Dept. of Health and Rehabilitative Services*, 656 So. 2d 902 (Fla. 1995) (insufficient factual record to attack constitutionality where no evidence adduced). Further, his reliance on such assertions underscores the need to afford the Governor procedural due process so that a competent factual record can be established.

II. SCHIAVO AND THE LOWER COURT FAILED TO RECOGNIZE THE CRITICAL DISTINCTION BETWEEN AN IMPLICATION OF PRIVACY RIGHTS AND AN INFRINGEMENT OF PRIVACY RIGHTS.

The lower court found the Act unconstitutional as an infringement on the right of privacy under Art. I, § 23, FLA.

CONST. (R. 1383). In so doing, the court made the incorrect assumption that any act that affects or touches upon privacy rights is necessarily an infringement or violation of those rights. Florida cases discussing the right to privacy often use the terms "implicate," "infringe," and "impinge." *See, North Florida Women's Health and Counseling Service v. State*, 866 So. 2d 612 (Fla. 2003); *In re T.W.*, 551 So. 2d 1186 (Fla. 1989). Although these terms are sometimes used interchangeably, reference to their dictionary definitions reveals important distinction.[3] "Implicate" is a neutral term meaning: 1) "to show to be also involved;" 2) "to imply as a necessary circumstance, or as something to be inferred or understood;" 3) "to connect or relate to intimately; affect as a consequence." An act may "implicate the right to privacy either negatively or positively. On the other hand, "infringe" has a negative connotation and means "to commit a breach or infraction of; violate or transgress;" 2) "to encroach or trespass." Similarly, "impinge" is defined as "to make an impression; have an effect or impact; 2) to encroach or infringe; 3) to strike, dash, collide; 4) to come into violent contact." Random House Webster's Unabridged Dictionary, 961,980 (2d ed. 2000). These definitions support the Governor's contention that there is a pivotal distinction between an action which infringes or violates the right to privacy and an action which merely affects or implicates the right to privacy. For the Act to be unconstitutional, it must violate privacy rights, not merely implicate them.

Certainly, all manner of legislative enactments implicate, involve, or touch upon the right to privacy without necessarily infringing upon or violating that right. Legislation affecting any acts may arguably implicate privacy concerns. However, this Court has held that the strict scrutiny standard

---

[3] Courts may utilize dictionaries to determine the plain and ordinary meaning of words. *Advisory Opinion to the Attorney General re: Florida Minimum Wage Amendment*, 2004 WL 1574232 (Fla. 2004).

is only necessary if the challenged enactment was found to violate the right of privacy. *Renee B. v. Florida Agency for Health Care Administration*, 790 So. 2d 1036 (Fla. 2001) (rule precluding state funding of abortions did not infringe on the right to privacy and thus did not require the strict scrutiny analysis). *In Renee B.*, the challenged rules certainly affected personal and private decision-making regarding abortion, but the mere implication of the right to privacy did not amount to a violation of that right. *Id.*

Although this Court, in North Florida, at times uses the terms "implicate" and "infringe" interchangeably, the substance of the opinion clearly shows that the Court first determined that the Parental Notice of Abortion Act implicated a minor's right of privacy prior to finding that the act infringed upon that right. To do so, this Court reviewed a substantial factual record developed in the lower court via the adversary process. *North Florida*, 866 So. 2d at 616, 630-631. In this case, before finding an infringement on or violation of Terri's right to privacy, there must be an adjudication of facts—particularly adjudication of the factual issue of her wishes under the present circumstances. *See, Shaktman v. State*, 553 So. 2d 148, 153 (Fla. 1989) (Ehrlich, C.J., concurring) ("whether an individual has a legitimate expectation of privacy in any given case must be made by considering all the circumstances, especially objective manifestations of that expectation"). Unless and until the Act is determined to violate Terri's right to privacy, the Act should be viewed as presumptively constitutional.

III. BY ENTERING SUMMARY FINAL JUDGMENT FOR SCHIAVO, THE LOWER COURT VIOLATED THE GOVERNOR'S FEDERAL DUE PROCESS RIGHTS.

The Governor has procedural and substantive due process rights guaranteed under both state and federal law. These rights include the right to discovery, the right to cross-

examine witnesses, and the right to a jury trial or an evidentiary hearing with respect to factual matters. *See, e.g.*, Art. 1, § 22, FLA. CONST.; U.S. CONST. amend. VII; U.S. CONST. amend. XIV, § 1; and Rules 1.430 and 1.280, Fla. R. Civ. P. Although Schiavo asks this Court to decide this case only on state constitutional grounds (AB, p. 4 fn.4), the Court certainly cannot ignore the obvious violations of the Governor's due process rights under the federal constitution. *See, Richards v. Jefferson County, Ala.*, 517 U.S. 793 (1996) (violates the due process clause of the Fourteenth Amendment to bind litigants to a judgment rendered in an earlier litigation to which they were not parties and in which they were not adequately represented) (citing *Hansberry v. Lee*, 3 11 U.S. 32 (1940)).

The purpose of due process is to ensure adequate safeguards for constitutional rights. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). In this case, as explained in detail in the Initial Brief, the Governor has been wholly deprived of these safeguards. He has been denied the opportunity to examine or cross-examine any witnesses and denied the opportunity to conduct any discovery whatsoever. Rather, he has been forced to accept as "facts" incompetent allegations and hearsay which have just as little probative value as the newspaper editorials Schiavo relies upon for his statement of facts in this appeal.

IV. THE ACT DOES NOT ENDOW THE GOVERNOR WITH THE ABILITY TO NULLIFY FINAL ORDERS NOR PROVIDE HIM STANDARDLESS DISCRETION TO IGNORE HEALTH CARE CHOICES.

Although Schiavo argues, in unnecessarily dramatic language, that the Act essentially renders court orders inoperative, (AB, p. 3 I), he patently ignores the fact that in Schiavo II, the Second District invited the guardianship court to modify its prior judgment if circumstances warranted such

a change. *Schindler v. Schiavo*, 792 So. 2d 551,559 (Fla. 2d DCA 2001). As the Second District Court explained, orders such as the order granting Schiavo authority to remove Terri's feeding tube are not final, and may be challenged at any time. *Id.* This fact is apparently irrelevant to Schiavo, who makes the stunning (and wholly unsubstantiated) claim that "determining Mrs. Schiavok intent (again) is not material" and that even if a "hundred juries" determined that Terri wanted food and fluids, that would be constitutionally irrelevant (AB, p. 9, 16).

Schiavo also protests that if the Governor can conduct discovery on the facts pertinent to this case, "no judicial judgment is ever final because strangers . . . can always refuse to acknowledge that judgment." (AB, p. 47). This simply makes no sense. Strangers are not bound by judgments between other parties. *Gentile v. Bauder*, 7 18 So. 2d 781, 783 (Fla. 1998). Moreover, "Strangers" normally will not have standing, or colorable arguments, upon which they can challenge judgments affecting another person. On those rare occasions that such standing exists, it would violate due process to say such strangers are bound by a decision in which they had no representation.

Properly construed in *pari materia* with other laws, including Chapter 765, Florida Statutes, the Act does not provide the Governor with standardless discretion. Specifically, § 765.401, FLA. STAT., refers to various proxies who may enter proceedings and act in circumstances where a patient has not previously executed an advanced directive. By passing the Act, the legislature determined that the Governor should be permitted to act as a proxy in a very narrow set of circumstances. Further, there is a vast difference between a privy and a person who is merely authorized to act as a proxy. A "proxy" is "one who is authorized to act as a substitute for another." Black's Law Dictionary, 1241 (7th ed. 1999). In contrast, a "privy" is "a person having a legal interest of

privity in any action, matter, or property." *Id.* at 1218. A finding of privity requires determination that two parties have a legally cognizable interest in the same proceeding. *Id.* at 1217. Determination of a person's status as a "privy" requires examination into the circumstances of each case. *Thompson v. Haynes*, 294 So. 2d 69, 71-72 (Fla. 1st DCA 1971). *See also, C.L. Whiteside and Associates Construction Company, Inc. v. The Landings Joint Venture, Inc.*, 626 So. 2d 1051 (Fla. 4th DCA 1993) (questions of privity and common interest are factual in nature). This is yet another factual issue undecided by the lower court.

V. THIS COURT SHOULD DECLINE TO ADDRESS SCHIAVO'S ALTERNATIVE GROUNDS FOR FINDING THE ACT UNCONSTITUTIONAL.

Schiavo's Answer Brief posits additional alternative grounds for affirmance of the lower court order entering summary final judgment. (AB, pp. 10, 40-44). As Schiavo concedes, the lower court did not reach these issues, and in fact, expressly reserved the opportunity to address them at a later date if the Act was found constitutional by a reviewing court. (AB, p. 40). Just as with the other issues in this case, no competent factual record was developed from which to formulate arguments. As such, this Court should decline Schiavo's invitation to short-circuit the litigation process by attempting to address such matters at this time. However, in the interest of caution, the Governor will briefly address why these alternative arguments are without merit, particularly in the absence of a record.[4]

---

[4] Although only briefly addressed herein, these arguments and others were presented at length in the lower court and can be found in the Governor's Corrected Brief, filed in the lower court on November 20, 2003. The Corrected Brief is found in the Record of this Appeal at R. 465-530.

A. The Act Does Not Violate Equal Protection.

The analysis applied to the Act for purposes of determining whether it violates Florida and federal constitutional guarantees of equal protection is functionally equivalent to that utilized when testing the Act for validity under Florida's right to privacy. Just as the Act passed muster under that challenge it also meets constitutional strictures under an equal protection analysis.

Classifications drawn by the legislative branch, which are intended as a response for perceived ills, need be drawn no broader than necessary in order to remedy those ills. *State v. Peters*, 534 So. 2d 760,763 (Fla. 3rd DCA 1988) citing *Sernbler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 610, 55 S. Ct. 570,571 (1935). The limited scope of the Act is plainly tailored to the legislature's response to a particularly egregious problem and is structured to address that problem. Here the legislature has determined that in order to protect and preserve life and to protect the disabled it must permit the Governor to reinstate nutrition and hydration to a person who has actually been determined to be in a persistent vegetative state and who has had those necessities withdrawn in the context of a dispute over the patient's condition and wishes. Such a limited intrusion and narrowly drawn class is fully in concert with the constitutional standards imposed upon statutes such as the Act.

B. The Act Is Not An Unlawful Bill Of Attainder.

Schiavo claims that the Act is unconstitutional as an unlawful bill of attainder and thus is in violation of Article I, Section 10, Florida Constitution. Schiavo claims further that the Act by its terms necessarily "singles out" Terri and imposes a "punishment" upon her without benefit of a judicial trial. The Act could apply to any person who meets the conditions set out in Section (l)(a)-(d). None of these conditions is so limiting that only Terri can fall within them.

Second, nothing in the Act evidences any determination on the part of the legislature that a person who falls within its ambit has had his or her "guilt [determined] for prior conduct" or that the Act "inflicts punishment." Both of these effects are required for the Act to be a bill of attainder. *Mayes v. Moore*, 827 So. 2d 967,972 (Fla. 2002); *Plaut v. Spendthrgt Farm*, 115 S. Ct 1447, 1463 n.9 (1995).

Far from a legislative determination of "guilt," the Act operates to ensure that a person's wishes are determined and carried out. There is simply no conduct of Terri for which the law could assert retribution or deter. Schiavo's claim that the Act "punished" Terri by depriving her of her constitutional rights presupposes that those rights were violated. If they were not, as the Governor argues, then the Act cannot be a punishment.

C. The Act Is Not An Invalid Special Law.

A general law is operates "uniformly within the state, uniformly upon subjects as they exist within the state, or uniformly within a permissible classification." *Schrader v. Florida Keys Aqueduct Auth.*, 840 So. 2d 1050, 1055 (Fla. 2003). Further, a "general law operates uniformly, not because it operates upon every person in the state, but because every person brought under the law is affected by it in a uniform fashion." Dep't of Legal Affairs v. Sanford-Orlando Kennel Club, 434 So. 2d 879, 881 (Fla. 1983). It is irrelevant from a constitutional standpoint that the Act may only impact one person so long as it treats all persons within its ambit equally and operates uniformly throughout the state. *See Cesary v. Nat'l Bank of N. Miami*, 369 So. 2d 917, 921-922 (Fla. 1979) for an example of just such a situation. ("It might be that the railroad of the complainant is the only property affected by the act. Such a state of affairs would not make it a special law.")

The Act operates universally throughout the state so long as a person meets the prerequisites set forth in Section (l)(a)-(d). These conditions were discussed in the Governor's initial brief, but it is important to emphasize that each condition was capable of replication throughout the state on October 15, 2003. Further, none of the conditions is limited to a particular region or portion of the state and none is based either explicitly or implicitly upon conditions peculiar to a particular region. Thus, the Act is easily distinguishable from the law declared invalid in *City of Miami v. McGrath*, 824 So. 2d 143 (Fla. 2002) (law invalid since it only applied to cities that had reached a certain population on a particular date prior to the law's enactment thus limiting the reach of the law to specific cities). The fact that the Act operates upon a temporally closed class of persons, *i.e.*, those who met its conditions on October 15, 2003, is of no constitutional importance when the Act operates uniformly and universally upon those persons covered by it throughout the state. Moreover, while not required due to its universal application, the Act is constitutional since it addresses issues substantially affecting the people of the state as a whole in advancing compelling state interests in the preservation of life, the protection of persons with disabilities, and the protection of the integrity of the medical profession.

In his brief, Schiavo makes the unsupported assertion that the Act "is indisputably targeted at Mrs. Schiavo and no one else." (AB, p. 3, 21, 31, 40, 41, 42, 44). At the same time, he makes the contradictory concession that the Act applies to a set of patients, thus undercutting his own argument that Act could only be applied to Terri. (AB, p. 8) ("all patients to whom it applies"); (AB, p. 13) ("every person who conceivably falls within its terms"). Thus, while Terri may be the only person ultimately affected by the Act, that happenstance is constitutionally irrelevant, as is whether the members of the legislature were aware of that fact when they passed it. Dep't

of Legal Affairs v. Sanford-Orlando Kennel Club, 434 So. 2d at 882.

CONCLUSION

This Court should recall Schiavo's argument that even if a "hundred juries" determined that Terri Schiavo wanted to be provided food and water under the present circumstances, such judgments would be constitutionally irrelevant. (AB, p. 9, 16). This is an astounding admission and certainly leads to the inference that Schiavo's opposition to a valid fact-finding process which adheres to the requirements of due process is rooted in a fear that such a process may very likely reveal that Terri's wishes differ from his own.

Nevertheless, this Court should not be faced with the task of sorting out the truth of the various allegations underlying the constitutional issues in this case—that is the task of a trial court operating within the confines of due process. The Governor therefore urges this Court to recognize that Ch. 2003-4 18, Laws of Florida, rather than violating Terri Schiavo's right to privacy, in fact provides a much needed additional layer of protection for the health care decisions of an incompetent patient who did not memorialize her health care choices in writing.

Accordingly, the Governor requests this honorable Court to vacate the Summary Final Judgment and remand this matter to the Circuit Court for the Sixth Judicial Circuit to permit the development of a competent factual record through discovery and trial by jury. In the alternative, the Governor requests this Court find Chapter 2003-41 8, Laws of Florida and the Governor's actions pursuant thereto to be constitutional.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express Overnight Delivery to George J. Felos, Felos & Felos, P.A., 595 Main Street, Dunedin, Florida 34698; to Thomas J. Perrelli, Robert M. Portman, Nicole G. Berner, Jenner & Block, LLC, 601 13th Street, NW, Suite 1200, Washington, DC; to Randall C. Marshall, Legal Director, American Civil Liberties Union of Florida, 4500 Biscayne Blvd., Suite 340, Miami, Florida, 33 137; to Jay Vail, Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399; and to James Alan Sekulow, James M. Henderson, Sr., Walter M. Weber, David Cortman, ACLJ, 1000 Hurricane Shoals Road, Suite D-600, Lawrenceville, GA 30043; to Patricia Fields Anderson, 447 Third Avenue North, Suite 405, St. Petersburg, Florida 33701; to Max Lapertosa, Kenneth M. Walden, Aliza Kaliski, Access Living, 6 14 West Roosevelt Road, Chicago, Illinois 60607; to George K. Rahdert, Rahdert, Steele, Bryan & Bole, P.A., 535 Central Avenue, St. Petersburg, Florida 33701; to William L. Sanders, Jr., Center for Human Life and Bioethics at The Family Research Council, 801 G Street, NW, Washington, DC 20001; to Jan G. Halisky, 507 S. Prospect Avenue, Clearwater, Florida 33756; to Mary L. Wakeman, Lauchlin T. Waldoch, Scott M. Solkoff, The Elder Law Section of the Florida Bar, 101 N. Monroe Street, Suite 900, Tallahassee, Florida 32302-0229; to Mary L. Wakeman, Russell E. Carlisle, Lauchlin T. Waldoch, Edwin M. Boyer, AFELA, 101 N. Monroe Street, Suite 900, Tallahassee, Florida 32302-0229; to David S. Ettinger, Jon B. Eisenberg, Horvitz & Levy, LLP, 15760 Ventura Blvd., 18' Floor, Encino, California 91436; to Bruce G. Howie, 5720 Avenue, St. Petersburg, Florida 33707; to Gordon Wayne Watts, 821 Road, Lakeland, Florida 33801-21 13, on this 5th day of August 2004.

/s/ Camille Godwin
KENNETH L. CONNOR
CAMILLE GODWIN

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with Florida Rule of Appellate Procedure 9.210 requiring the font size of the type herein to be at least fourteen points if in Times New Roman format.

/s/ Camille Godwin
KENNETH L. CONNOR
CAMILLE GODWIN

APPENDIX H

IN THE CIRCUIT COURT FOR PINELLAS COUNTY,
FLORIDA PROBATE DIVISION

File No. 90-2908GD-003

IN RE: THE GUARDIANSHIP OF
THERESA MARIE SCHIAVO,
Incapacitated.

MICHAEL SCHIAVO, as Guardian of the person of
THERESA MARIE SCIHAVO,
Petitioner,

vs.

ROBERT SCHINDLER and MARY SCHINDLER,
Respondents.

ORDER

THE COURT held a hearing on September 11, 2003 pursuant to the Mandate of the Second District Court of Appeal dated August 25, 2003. The hearing was scheduled by Order of this court rendered August 28, 2003 to immediately follow another hearing previously scheduled by counsel.

The purpose of the. hearing was to schedule the removal of the nutrition and hydration tube in this very long and extremely difficult case. The Second District Court of Appeal in *Schindler v. Schiavo*, 851 So.2d 182 (Fla. 2d DCA 2003), made observations- with which this court frilly concurs.

> The judges on this panel are called upon to make a. collective, objective decision concerning a question of law. Each of us, however, has our own family, our own loved ones, our own children. From our review of the

videotapes of Mrs. Schiavo, despite the irrefutable evidence that her cerebral cortex has sustained the most severe of irreparable injuries, we understand why a parent who had raised and nurtured a child from conception would hold out hope that some level of cognitive function remained. If Mrs. Schiavo were our own daughter, we could not but hold to such a faith.

But in the end, this case is not about the aspirations that loving parents have for their children. It is about Theresa Schiavo's right to make her own decision, independent of her parents and independent of her husband. In circumstances such as these, when families cannot agree, the law has opened the doors of the circuit courts to permit trial judges to serve as surrogates or proxies to make decisions about life-prolonging procedures. *See In re Guardianship of Browning*, 568 So.2d 4 (Fla. 1990) (affirming *In re Guardianship of Browning*, 543 So.2d 258, 273-4 (Fla. 2d DCA 1989)); *see also* § 765.401(3), Fla. State. (2000), It is the trial judge's duty not to make the decision that the judge would make for himself or herself or for a loved one. Instead, the trial judge must make a decision that the clear and convincing evidence shows the ward would have made for herself. § 765.401(3). It is a thankless task, and one to be undertaken with care, objectivity, and a cautious legal standard designed to promote the value of life. But it is also a necessary function if all people are to be entitled to a personalized decision about life-prolonging procedures independent of the subjective and conflicting assessments of their friends and relatives.

At the hearing, the Court heard from counsel and, based upon the Mandate, it is

ORDERED AND ADJUDGED that the Guardian, Michael Schiavo, shall cause the removal of the nutrition and hydra-

tion tube from the Ward, Theresa Marie Schiavo, at 2:00 p.m. on the 15th day of October, 2003.

DONE AND ORDERED in Chambers, at Clearwater, Pinellas County, Florida this 17th day of September, 2003 at 3:30 o'clock.

/s/ George W. Greer
GEORGE W. GREER
Circuit Judge

90-2908-GD-003
Copies furnished to:

Patricia Fields Anderson, Esquire
George L Felos, Esquire
Deborah A. Bushnell, Esquire
Gyneth S. Stanley, Esquire
Lawrence Crow, Esquire
Pamela A. M. Campbell, Esquire
Scott P. Swope, Esquire
Joseph D. Magri, Esquire

Supreme Court, U.S.
FILED
DEC 29 2004
OFFICE OF THE CLERK

(2)

No. 04-757

IN THE

Supreme Court of the United States

JEB BUSH,
GOVERNOR OF THE STATE OF FLORIDA,
Petitioner,

v.

MICHAEL SCHIAVO,
GUARDIAN: THERESA SCHIAVO
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Florida

AMICUS BRIEF OF TERRI SCHIAVO'S PARENTS MARY AND ROBERT SCHINDLER IN SUPPORT OF THE PETITIONER

DAVID C. GIBBS III
BARBARA J. WELLER
GIBBS LAW FIRM
5666 Seminole Blvd., Suite 2
Seminole, FL 33772
(727) 399-8300

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
COLBY M. MAY
JAMES M. HENDERSON, SR.
WALTER M. WEBER
DAVID A. CORTMAN
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Avenue, N.E.
Washington, DC 20002
(202) 546-8890

Counsel for Amici
Mary and Robert Schindler

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. THIS COURT MUST VIEW THE FACTS IN THE LIGHT MOST FAVORABLE TO THE PETITIONER. 3

II. THE FLORIDA SUPREME COURT'S APPLICATION OF THE STATE CONSTITUTION IS ANOMALOUS IN THE EXTREME 5

A. Separation of Powers 5

B. Unlawful Delegation 6

III. IN THE ALTERNATIVE, THIS COURT SHOULD REMAND SO THAT THE FLORIDA SUPREME COURT CAN CLARIFY THE BASIS FOR ITS REJECTION OF PETITIONERS' FEDERAL CLAIMS. 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Askew v. Cross Key Waterways, 372 So. 2d 913 (Fla. 1978) 7
Avatar Development Corp. v. State, 723 So. 2d 199 (Fla. 1998) 8
Brophy v. New England Sinai Hosp., 398 Mass. 417, 497 N.E.2d 626 (1986) 1
Brosseau v. Haugen, 73 U.S.L.W. 3350 (U.S. Dec. 13, 2004) (No. 03-1261) (per curiam) 3
Bush v. Palm Beach County Canvassing Board, 531 U.S. 70 (2000) 2, 10
Employment Division v. Smith, 485 U.S. 660 (1988) 10
Microtel, Inc. v. Florida Public Serv. Comm'n, 464 So. 2d 1189 (Fla. 1985) 7, 8
Moore v. Morris, 475 So. 2d 666 (Fla. 1985) 3
State Dep't of Citrus v. Griffin, 239 So. 2d 577 (Fla. 1970) 7,8
State v. Cain, 381 So. 2d 1361 (Fla. 1980) 8
Villazon v. Prudential Health Care Plan, 843 So. 2d 842 (Fla. 2003) 3

STATUTES

Fla. Stat. § 39.401 5
Fla. Stat. § 73.021 5
Fla. Stat. § 765.101(12) 3
Fla. Stat. § 940.01 6

IDENTITY AND INTEREST OF AMICI[1]

Amici Mary and Robert Schindler are the parents of Terri Schiavo. Their interest in this case is in: saving Terri's life and providing her with therapy and rehabilitation;[2] protecting her from a guardian -- her estranged husband, Michael -- who has flagrant conflicts of interest and who seeks Terri's death; obtaining for Terri a guardian who will zealously seek her welfare; and, defending the statute and executive order at issue here which were all that stood[3] between Terri and an excruciating death by starvation and dehydration.[4]

The Schindler's sought unsuccessfully to intervene in the present case. Lacking party status, the Schindlers submit this brief, with the consent of the parties, as amici curiae.

SUMMARY OF ARGUMENT

This is not a "right to die" case. Rather, this case is about efforts to protect a vulnerable, disabled young woman from harm at the hands of those with manifest conflicts of interest. Amici offer three points.

First, because this case arrives on appeal from the grant of

---

[1]No person or entity other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

[2]As noted below, *infra* § I, in the posture of this case the Court must take as true the proposition (which amici firmly believe is accurate) that Terri is *not* in a persistent vegetative state, that she can communicate, and that she *would* benefit from therapy. *See also infra* note 7.

[3]The circuit court recently entered a stay which protects Terri during the pendency of an appeal in the underlying guardianship proceedings. *See* Order, *In re Schiavo*, No. 90-2908-GD-003 (Pinellas County Cir. Ct. Oct. 28, 2004).

[4]*See Brophy v. New England Sinai Hosp.*, 398 Mass. 417, 444 n.2, 497 N.E.2d 626, 641 n.2 (1986) (Nolan, J., dissenting) (detailed description of death by dehydration and starvation).

summary judgment, this Court must indulge all factual inferences in favor of the petitioner. Thus, this Court must assume that Terri Schiavo is *not* in a "persistent vegatative state," that she is aware and able to communicate, and that she could benefit from rehabilitation therapy. Further, this Court must assume that Terri does *not* wish to die from starvation and dehydration, and that respondent, her estranged husband and legal guardian, wants Terri to die for his own selfish reasons (to inherit her estate and to marry his live-in fiancée).

Second, the legal rationale the Supreme Court of Florida gave for its ruling is so dramatically out of step with its previous statements of the Florida doctrines of separation of powers and unlawful delegations that the ruling below can only be understood as having minted a *new rule* applicable only in the context of treatment decisions for incompetent persons. That new rule is that, unlike in any other context, once the state courts have ruled on a *treatment decision for an incompetent person,* the independent police powers of the executive and legislative branches are wholly extinguished. That new rule, as the petitioner has demonstrated, is unconstitutional, *as applied*, as a matter of federal due process and equal protection.

Third, the strikingly anomalous nature of the state supreme court's ruling, combined with that court's complete failure to explain why it rejected petitioner's assertion of federal rights, warrant a remand for clarification. *See Bush v. Palm Beach County Canvassing Board,* 531 U.S. 70, 78 (2000) (per curiam). A remand would allow the court below to clarify whether in fact the court's new rule is limited to the context of treatment decisions for incompetent persons, and why the court did not believe it needed to address petitioner's assertion of federal rights. Such a clarification, in turn, would greatly assist this Court in delimiting the precise federal question presented.

ARGUMENT

The Supreme Court of Florida has rendered an astonishing and unprecedented ruling. That court held that once any court, in litigation between private parties, has issued a decree regarding the care and treatment of an incompetent person, neither the legislative nor the executive branch can take independent steps on behalf of the incompetent person's welfare.

As petitioner Governor Jeb Bush has demonstrated, the state supreme court's construction of the Florida Constitution to produce such a ruling renders that *state* constitution, *as applied,* unconstitutional under the *federal* constitution, both as a matter of due process (denying Terri Schiavo a fair and accurate determination of her wishes, and denying the state, acting as her proxy, the opportunity to litigate issues material to Terri's rights) and equal protection (applying this restrictive rule only in the context of incompetent persons).

Terri's parents Mary and Robert Schindler, as amici, wish to highlight several points in support of the petition.

I. THIS COURT MUST VIEW THE FACTS IN THE LIGHT MOST FAVORABLE TO THE PETITIONER.

It is black-letter law that, on appeal from a grant of summary judgment, the reviewing court must assess the facts in the light most favorable to the party resisting summary judgment. *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985); *Villazon v. Prudential Health Care Plan*, 843 So. 2d 842, 853 (Fla. 2003); *cf. Brosseau v. Haugen*, 73 U.S.L.W. 3350, 3350 n.2 (U.S. Dec. 13, 2004) (same standard under federal rules). In the present case, that means this Court must assume the following:

- Terri Schiavo is *not* in a "persistent vegetative state;"[5]

---

[5]*See* Fla. Stat. § 765.101(12) ("persistent vegetative state" defined to (continued...)

- Terri's condition is neither terminal[6] nor untreatable; rather, she could benefit from therapy and regain some or all of the functions she has lost;
- Terri is aware of her surroundings and is able to communicate;[7] with therapy, Terri might regain some or all of her speech skills;
- Terri *did not and does not want to die*, especially by starvation and dehydration;[8]
- Michael Schiavo, Terri's legal husband and guardian and the respondent here, is living with another woman who has borne him two children; he wants Terri to die so he can marry this other woman without divorcing Terri;
- Michael Schiavo refuses to divorce Terri because to do so would cut off his inheritance of what remains of her assets;
- Michael does *not* have Terri's best interests at heart; in fact, he may be responsible for having caused her condition (by battering her) and may have repeatedly physically abused Terri when she was still competent.[9]

---

[5](...continued)
require "unconsciousness," total absence of voluntary action and cognition, and inability to "communicate or interact purposefully"). Terri plainly does not satisfy this definition. *See infra* note 7.

[6]Terri turned 41 on December 3, 2004.

[7]*See* www.terrisfight.org (linking to videos of Terri).

[8]Respondent himself conceded in the state supreme court that, under his legal theory, determining Terri's "intent" is "not material," and that even if a "hundred juries" found against respondent on the issue of Terri's intent, the challenged law would still supposedly be unconstitutional under the Florida constitution. Answer Brief at 9, *Bush v. Schiavo* (Fla. July 23, 2004).

[9]*See* www.terrisfight.org/images/bonescan.jpg (bone scan report finding evidence of "history of trauma").

Respondent certainly has the right to contest the facts. In the present posture of the case, however, these factual suppositions must be taken as true.

II. THE FLORIDA SUPREME COURT'S APPLICATION OF THE STATE CONSTITUTION IS ANOMALOUS IN THE EXTREME.

A state constitutional provision need not be applied in a bizarre manner in order to be violative of the federal constitution. It is helpful to note, however, the gravely anomalous nature of the state supreme court's ruling here. That anomaly underscores the fact that the state supreme court in effect issued a unique, aberrant rule only to govern treatment decisions for incompetent persons.

A. Separation of Powers

The state supreme court purported to invalidate the challenged statute as a violation of the state constitutional guarantee of separation of powers. As applied in this case to shut off federal rights, this state doctrine is unconstitutional.

It is black-letter law, and simple common sense, that the state sovereign is not bound by litigation between private parties. Rather, the sovereign retains its independent authority.

For example, competing property claimants may litigate and resolve title to a tract of realty. The state may subsequently condemn the very same property under its eminent domain authority. *See* Fla. Stat. § 73.021.

Or, a divorcing couple may litigate the issue of custody over a child. After the court awards custody to one of the parents, the state may nonetheless take protective custody of that child upon sufficient suspicion of child abuse. *See* Fla. Stat. § 39.401.

In neither case would a claim that state intervention violates the "separation of powers" survive the straight-face test. That a

court has spoken in a given situation does *not* preclude third parties in general, and the state in particular, from asserting an interest in the subject of the litigation.

Indeed, even when the legislature has authorized the executive branch directly to intervene to nullify the effect of a judgment, as with the pardon or commutation of the sentence of a convicted offender, Fla. Stat. § 940.01, no one could reasonably contend that the separation of powers is offended.

Yet the Florida Supreme Court, without purporting to distinguish such situations, declared that in regard to *treatment decisions for incompetent persons*, once a state court has spoken, no branch but the judiciary can intervene. Thus, in Florida, incompetent persons facing death by starvation have less legal protection than convicted felons (who may be pardoned despite a court-imposed judgment of guilt and sentence), abused children (who may be taken into protective custody despite a court having awarded the children to the alleged abuser), and even inanimate real property (which may be taken, with just compensation, from the adjudicated owner).

In short, the lower court's ruling is inexplicable as a matter of "separation of powers," and must instead be read as creating a special rule applicable only in cases involving the treatment of incompetent persons.

B. Unlawful Delegation

The state supreme court also purported to invalidate the challenged statute as an improper delegation of legislative authority to the executive. Again, however, this ruling is so much at odds with other applications of the nondelegation principle as to render the court's decision a special rule only for the situation of state intervention to protect incompetent persons. *As applied* in this matter to shut off federal rights, the state constitutional nondelegation doctrine is unconstitutional as a

matter of federal law.

Under the doctrine of nondelegation of legislative power under the Florida Constitution, the legislature must make the "fundamental and primary policy decisions" and then provide at least "some minimal standards and guidelines" for administration of the statute. *Askew v. Cross Key Waterways*, 372 So. 2d 913, 925 (Fla. 1978).

Here, the legislature made the "fundamental and primary policy decision" that, in circumstances like Terri's, there is sufficient reason to question the ongoing denial of food and fluids and to authorize life-saving intervention by the Governor.

"In implementing this policy decision," the legislature may transfer "[s]ubordinate functions" to an executive agent or body "with the expertise and flexibility needed to deal with complex and fluid conditions." *Microtel, Inc. v. Florida Public Serv. Comm'n*, 464 So. 2d 1189, 1191 (Fla. 1985). "Otherwise, the legislature would be forced to remain in perpetual session and devote a large part of its time to regulation." *Id.* Thus, the legislature

> may enact a law complete in itself, designed to accomplish a general purpose, and may expressly authorize designated officials within valid limitations to provide rules for the complete operation and enforcement of the law within its expressed general purpose.
>
> . . .
>
> This principle of law is peculiarly applicable to regulations under the police power, since the complex and ever-changing conditions that attend and affect such matters make it impracticable for the Legislature to prescribe all necessary rules and regulations.

State Dep't of Citrus v. Griffin, 239 So. 2d 577, 580-81 (Fla.

1970) (internal quotation marks and citation omitted).

Here, the state legislature narrowly delimited the circumstances in which the Governor could intervene and then entrusted to him the "operation and enforcement of the law." The state constitution normally requires no more. As the state supreme court has elsewhere observed,

> The Legislature itself is hardly suited to anticipate the endless variety of situations that may occur or to rigidly prescribe the conditions or solutions to the often fact-specific situations that arise.

Avatar Development Corp. v. State, 723 So. 2d 199, 204 (Fla. 1998).

The state supreme court has repeatedly upheld legislative authorizations of executive branch actions far more open-ended than what the law invalidated here contemplates. *E.g.*, *Avatar*, 723 So. 2d at 204 (no improper delegation where Department of Environmental Protection was authorized "to flesh out the Legislature's stated intent" by "creating rules, regulations and permit conditions necessary to effectuate the Legislature's overall policy"); *Microtel*, 464 So. 2d at 1191 (no improper delegation where commission was authorized to make certification decision "guided by the discretionary proviso that certification be in the public interest," illuminated by the "clear legislative intent to foster competition"); *State Dept. of Citrus*, 239 So. 2d at 578-79, 582 (no improper delegation where commission was authorized to promulgate marketing orders, suspend those orders if the Commission "determines that the order does not tend to effectuate the declared purpose of the Act," establish plans and programs for "advertising, merchandising and sales promotion to create new or larger domestic or foreign markets for oranges" (quoting statute), and set assessment rate, subject to a statutory ceiling); *State v. Cain*,

381 So. 2d 1361, 1362 (Fla. 1980) (no improper delegation where legislature authorized state attorney, "when in his judgment and discretion the public interest requires" (quoting statute), to prosecute, as adults, juveniles who are age sixteen or older, and noting that even "absolute" charging discretion of prosecutor is not an invalid delegation of authority).

The statute at issue here authorizes the Governor to act in certain delineated circumstances, leaving to the Governor the discretion to weigh the factors bearing upon the competing courses of action. In any other context, this would not violate the Florida Constitution. Plainly, the legislature cannot sit as an ongoing therapeutic management board or as investigator for individual wards whose guardians develop flagrant conflicts of interest. Hence, it is perfectly sensible for the legislature to authorize the Governor to handle the actual application of the stay power the legislature created.

By dramatically departing from its prior practice, the state supreme court minted a new rule governing only cases involving the treatment of incompetent persons. This new, special rule shuts off, by its unique and exaggerated demands of rigid, nondiscretionary delegation, the petitioner's assertion of federal rights in this case.

III. IN THE ALTERNATIVE, THIS COURT SHOULD REMAND SO THAT THE FLORIDA SUPREME COURT CAN CLARIFY THE BASIS FOR ITS REJECTION OF PETITIONERS' FEDERAL CLAIMS.

The state supreme court decision at issue here, as noted in the preceding section, appears to be a *sui generis* application of state constitutional rules which would normally be satisfied in this case, but which have been given a uniquely, indeed aberrantly, super-strict interpretation in the context of state efforts to protect

vulnerable, disabled persons. Moreover, the court below failed to offer any explanation either for its departure from previous state decisions or its refusal even to address petitioner's federal claims.

In such circumstances, it may be advisable to remand the case with directions that the state supreme court clarify the following matters:

1. What is the scope of the state supreme court's ruling as to separation of powers and nondelegation? I.e., is this decision confined to the context of treatment decisions for incompetent persons, or is the court's ruling also applicable across the board as the new rule for state intervention regarding child custody and abuse, government condemnation of private property, gubernatorial pardons of convicted offenders, etc.?
2. On what basis did the state supreme court reject petitioner's assertion of federal constitutional rights?

Answering these questions would aid this Court in delimiting the precise federal questions presented in a way that would greatly facilitate review.

This Court took similar action in *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000) (per curiam). There, as here, the "considerable uncertainty as to the precise grounds for the decision" provided "sufficient reason" for a remand. *Id.* at 78 (internal quotation marks and citation omitted). Hence, this Court should consider a remand for clarification prior to accepting this case. *See also Employment Division v. Smith*, 485 U.S. 660 (1988) (remanding for clarification).

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

David C. Gibbs III
Barbara J. Weller
Gibbs Law Firm
5666 Seminole Blvd. Suite 2
Seminole, FL 33772
(727) 399-8300

Jay Alan Sekulow
Counsel of Record
Stuart J. Roth
Colby M. May
James M. Henderson, Sr.
Walter M. Weber
David A. Cortman
American Center for Law and Justice
201 Maryland Ave., N.E.
Washington, DC 20002
(202) 546-8890

Counsel for Amici Mary and Robert Schindler

December 29, 2004